(16,961.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 376.

D. P. TARPEY, PLAINTIFF IN ERROR,

vs.

ANDREW MADSEN.

IN ERROR TO THE SUPREME COURT OF THE STATE OF UTAH.

INDEX.

	Original.	Print.
Caption	*a*	1
Transcript from district court	1	1
Complaint	1	1
Answer and cross-complaint	4	2
Bill of exceptions	11	6
Statement of evidence	11	6
Testimony of Byron Groo	13	8
Motion for nonsuit, &c.	18	10
Judgment entered	18	11
Assignment of errors	19	11
Judge's certificate to bill of exceptions	19	11
Agreement as to bill of exceptions	19	11
Notice of appeal	20	11
Attorneys' certificate to transcript	21	12
Hearing and submission	22	12
Judgment	22	12
Opinion	23	13
Petition for writ of error	30	16
Order allowing writ of error	32	17
Writ of error	33	18
Assignment of errors	35	19
Citation and service	37	19
Bond	38	20
Clerk's certificate	40	21

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., NOVEMBER 9, 1898.

a In the Supreme Court of the State of Utah.

D. P. TARPEY, Appellant,
v.
ANDREW MADSEN, Respondent.

Marked: No. 911. Filed Feb. 11, 1898. Lilburn P. Palmer, clerk supreme court of Utah.

1 In the District Court of the Fourth Judicial District, Territory of Utah, County of Weber.

D. P. TARPEY, Plaintiff,
v.
ANDREW MADSEN, Defendant.
} Complaint.

Plaintiff complains and alleges:

That on January 12, 1892, the plaintiff was seized in fee and possessed and entitled to the possession of that certain tract of land situated in Box Elder county, Utah Territory, described as follows:

The southwest quarter of section twenty-nine, in township eleven (11) north, of range two (2) west, of the Salt Lake meridian, U. S. survey.

That while the plaintiff was so seized the defendant afterwards, on the 12th day of January, 1892, and without right or title, entered into the possession of the demanded premises and ousted and ejected the plaintiff therefrom, and now unlawfully withholds the possession thereof from the plaintiff, to his damage in the sum of $100.00.

That the value of the rents, issues, and profits of said premises from the said 12th day of January, 1892, and while the plaintiff has been excluded therefrom by the defendant is $25.00 per month.

2 That plaintiff claims title to the said above-described piece of land by reason of a conveyance thereof to him from the Central Pacific Railroad Co. as successor in interest for the Central Pacific Railroad Co. of California, by and under the provisions of the act of Congress of the United States approved July 1st, 1862, entitled "An act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific ocean, and to secure to the Government the use of the same for postal, military, and other purposes," and of an act amendatory thereof, passed by the Congress of the United States and approved July 2, 1864, entitled "An act to amend an act entitled 'An act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific ocean, and to secure to the Government the use of the same for postal, military, and other purposes,' approved July 1, 1862;" that the defendant herein pretends to have some title to said land by reason of a patent of the United States therefor, issued subsequent to the taking effect of the said acts and the grant thereunder, and

the said action involves the construction of the acts hereinbefore referred to and other acts amendatory thereof.

Wherefore the plaintiff demands judgment against the defendant for the recovery of the possession of the demanded premises, and the sum of $100 damages for the withholding possession thereof, and for the sum of $25.00 per month from January 12, 1892, for the value of the said rents, issues, and profits and costs of suit.

EVANS & ROGERS,
Attorneys for Plaintiff.

3 TERRITORY OF UTAH, } ss:
County of Weber, }

D. P. Tarpey, being first duly sworn, says that he is the plaintiff in the above-entitled action; that he has read the foregoing complaint and knows the contents thereof, and that the same is true of his own knowledge.

D. P. TARPEY.

Subscribed and sworn to before me this December 27th, 1893.

L. R. ROGERS,
Notary Public.

Filed January 12, 1894.

4 In the District Court of the Fourth Judicial District of the Territory of Utah, County of Box Elder.

D. P. TARPEY, Plaintiff,
v.
ANDREW MADSEN, Defendant. } Answer & Cross-complaint.

The defendant above named, for answer to the complaint of the plaintiff herein, denies:

That on January 12, 1892, or at any other time or at all, the plaintiff was seized in fee or possessed or was entitled to the possession of the said land mentioned and described in the plaintiff's complaint, or any part or parcel of said land.

The defendant denies that afterwards, on the 12th day of January, 1892, or at any other time or at all, the plaintiff was seized of said lands or any part thereof; denies that the said plaintiff was then or at any other time or at all entitled to the possession of said land or any part thereof, and denies that said plaintiff was then or at any other time or at all in the possession of said land or any part thereof; and defendant denies that he afterwards, on the 12th day of January, 1892, or that he at any other time or at all entered into the possession of the said premises and ousted and ejected plaintiff therefrom; and the defendant denies that heretofore or that
4½ he now or at any other time or at all unlawfully or otherwise withholds the said premises or any part thereof from said plaintiff, to his damage in the sum of one hundred dollars or any other sum whatever or to the said plaintiff's damage or at all. Defendant denies that the rents, issues, and profits of said premises

from the 12th day of January, 1892, or at any other time, is or was $25.00 per month or any other sum or of any other value whatever.

This defendant further alleges that he holds the said property from James Hansen and wife by deed duly authenticated and recorded, and also that he is a citizen of the United States, over the age of twenty-one years, the head of a family, and a qualified and competent pre-emptor and homesteader, and that he has settlement rights upon and to said land; that he settled upon the said land on or about the — day of ——, 1888, and has ever since occupied, cultivated, and improved the same, in compliance with the laws of the United States applicable to the disposal of public lands to settlers, in order to mature title to himself; that he has made lasting and valuable improvements on said lands, such as a house, stable, stock yards, corrals, digged wells, planted gardens, and built roads, and has broken, cleared, and cultivated a large portion of said land, to wit, about 60 acres, and has fenced the whole of said lands and other improvements made and owned on said lands; that his improvements are reasonably worth and have permanently enhanced the value of the said lands to the extent of $3,000.

This defendant further alleges that the said land is and was at all times mentioned public land of the United States; that at the time the grant *the* the Central Pacific Railroad Company took effect the said land was cultivated, improved, occupied, claimed, appropriated, interdicted, reserved, and excepted land, and was not of the character contemplated by the grant to the said railroad company.

The defendant further alleges that the plaintiff watches, contracts for, and grades lands of the Central Pacific Railroad Company, and that he procures evidence in trials and hearings for it, and that he is its agent and representative; that on or about the 31st day of October, 1884, an agent of the said Central Pacific Railroad Company made out in writing, verified by oath, and presented to the register and receiver at Salt Lake City, Utah, selection list No. 3 of the Central Pacific Railroad Company for lands claimed to have been granted to it, and the above-described premises were included in the list, and the said agent falsely and fraudulently stated and represented that all of the lands in the said list contained were vacant, unappropriated, not interdicted, nor reserved lands, and were of the character contemplated by the grant to the Central Pacific Railroad Company, and the said land officers were deceived and mislead thereby into the allowance and approval of the same; that on or about the — day of ——, 1892, a contest was initiated under the laws governing the Land Department and the above facts were set forth before the register and receiver of the United States land office at Salt Lake City, Utah; that the honorable Commissioner of the General Land Office ordered a hearing, and that notice was served, and the Central Pacific Railroad Company appeared in the said proceedings, and the said plaintiff, D. P. Tarpey, land agent of the Central Pacific Railroad Company, appeared in the said proceeding, and the said case was tried under his management and direction; that when this action was commenced there was and

now is another action pending before said department between the same parties and for the same cause set forth in the complaint
6 in this action; that the said contest has not finally been determined, but the same is now being waged, and the said department is now proceeding to determine the question of title which the law submits to it.

Defendant, further answering and for defense, alleges that he and those under whom he purchased and through whom he claims and their vendors have been in the actual, peaceable, exclusive, and quiet possession of said lands and premises and held the same and every part thereof, with all the improvements thereon, openly, notoriously, and adversely to said plaintiff and to all the world, except the United States, for more than twenty-eight years next last past and prior to the commencement of this suit, and said cause of action is barred by the statute of limitations, as provided by sections 3130, 3131, 3132, 3133, and 3134, pages 220, 221, Compiled Laws of Utah, 1888, title 11, chapter 1; and defendant here specially pleads and relies on the statute of limitations as a complete defence to this suit.

Defendant, further answering and for further defense, alleges:

That the said plaintiff, D. P. Tarpey, claiming the southwest quarter of section twenty-nine, township ten north, of range two west, the land described in the complaint, through the Central Pacific Railroad Company, on or about the 26th day of April, 1890, entered into a purported agreement to sell the same to one A. H. Snow; that the said A. H. Snow attempted to purchase the same while this defendant, Andrew Madsen, was in the open and notorious possession of the same, and the said premises were well known to said Snow, who took said land well knowing the right and claim of this defendant, Andrew Madsen, thereto, and therefore took the pretended title subject to the rights of Madsen, the plaintiff
7&8 herein; that afterwards, to wit, on the 25th day of April, 1891, the said A. H. Snow commenced an action, No. 3108, "A. H. Snow *v.* Andrew Madsen," in this court, in ejectment, for the possession of the said land and for damages and for rents, issues, and profits; that afterwards, to wit, on the 21st day of September, 1891, the said defendant, D. P. Tarpey, and his wife delivered a purported deed to the said A. H. Snow, pretending to convey the said premises.

That afterwards, to wit, on the 6th day of June, 1891, at Brigham City, Box Elder county, Utah Territory, and while the said suit No. 3108, "A. H. Snow *v.* Andrew Madsen," was pending in the said district court, this defendant, Andrew Madsen (defendant in the original complaint), and the said A. H. Snow entered into an agreement in writing, under their hands and seals, of which the following is a copy:

"(Duplicate.)

This agreement, made and entered into this 6th day of June, 1891, between Andrew Madsen, the party of the first part, and A. H. Snow, the party of the second part, witnesseth: That the said party of the

first part, in consideration of $1, the covenants and agreements on the part of the said party of the second part hereinafter contained, agrees to sell unto the said party of the second part, all that certain lot, piece, or parcel of land, situate, lying and being in the county of Box Elder, and Territory of Utah, and bounded and described as follows, to wit: the southwest quarter of section 29, T. 11, N. R. 2 W., for the sum of $500 lawful money of the United States. And the said party of the second part in consideration of the premises within 60 days agrees to pay to the said party of the first part the said sum of $500, on the execution of these presents. In the event of a failure to comply with the terms hereof by the said party of the second part, the said party of the first part shall be released from all obligations in law or in equity to convey said property. And the said party of the second part shall forfeit all right thereto. And the said party of the first part, on receiving such payment at the time and in the manner above mentioned, agrees to execute and deliver to the said party of the second part, or to his assigns, a quit-claim deed. And it is understood that the stipulations aforesaid are to apply to and bind the heirs, executors, administrators, of the repective parties.

In witness whereof the parties to these presents have hereunto set their hands and seals, the day and year first above written.

ANDREW MADSEN. [SEAL.]
A. H. SNOW. [SEAL.]

The party of the first part hereby agrees to extend the time of payment of the above $500, 30 days, and the party of the second part agrees to pay in consideration of the extension interest on the same at 12 per cent. per annum.

Dated Aug. 6, 1891.

ANDREW MADSEN.
A. H. SNOW."

9 That before the time for the defendant Madsen to perform the conditions on his part the said Snow gave notice to the defendant that he had determined not to take the land, and the said A. H. Snow abandoned the agreement and ever since wholly failed to perform it.

That the said plaintiff, Tarpey, had full knowledge of the above agreement and of its having — made and entered into, and of the fact that the said Snow had abandoned the said agreement and had wholly failed to perform it, and of the fact that the said Snow had under the said agreement forfeited all right to the said land, and of the open and notorious possession of the same by the said defendant, Madsen; nevertheless, on the 11th day of January, 1892, the said plaintiff pretended to purchase of the said Snow the said land and premises, with full knowledge of the above facts, and pretended to take a purported conveyance, of which the defendant had no knowledge until Jan. 11, 1894, from the said Snow and wife to him, said Tarpey, for the said land and premises so by him, said Snow, forfeited.

And, having fully answered all the allegations of the complaint, the defendant prays hence to be dismissed with costs; and should the plaintiff prove a better title to said property, then and in that event this defendant asks judgment for the full value of all lasting improvements made upon said lands by this defendant or by those under whom he holds the same, in accordance with sections 2761, 2762, etc., of "An act concerning occupying claimants," Compiled Laws of Utah, 1888, vol. 11, page 127.

B. H. JONES,
Attorney for Defendant.

10 TERRITORY OF UTAH, } ss:
County of Box Elder, }

B. H. Jones, being first duly sworn, deposes and says that he is the attorney for the defendant in the above-entitled action; that he has read the foregoing complaint and knows the contents thereof, and that the same is true of his own knowledge except as to those matters therein stated on information and belief, and that as to those matters he believes it to be true.

The reason affiant verifies this answer is because defendant is absent from this county where af-iant resides, and therefore unable to verify it.

B. H. JONES.

Subscribed and sworn to before me this 6th day of April, 1894.
R. H. JONES,
Notary Public.

Marked: Filed May 14, 1894.

11 In the District Court of the First Judicial District of the State of Utah in and for Box Elder County.

D. P. TARPEY, Plaintiff,
v.
ANDREW MADSEN, Defendant. } Bill of Exceptions.

Be it remembered that this cause came on regularly for trial and was tried by this court with a jury on Nov. 18, 1897, whereupon the following proceedings were had:

The plaintiff proved by competent evidence:

1. That on June 28, 1861, the Central Pacific Railroad Company of California was duly incorporated and organized under the general laws of the State of California, and thereby authorized and empowered to construct a railroad from Sacramento, in the State of California, and to receive the land grants made by the acts of Congress hereinafter mentioned.

2nd item. That on October 8th, 1864, the said Central Pacific Railroad Company of California, with lawful authority, duly amended its articles of incorporation, and thereby became authorized and empowered to continue the construction of the railroad provided for and contemplated by the acts of the Congress herein-

after mentioned, and to receive the land grants made by those acts.

3rd item. That on July 1, 1862, the Congress of the United States, by its act approved on that day printed in volume 12 of the United States Statutes, on page 289 and following, authorized and empowered the said Central Pacific Railroad Company of Cali-
12 fornia to construct the road, and made it a grant of lands, as therein provided; which act was thereafter amended by the act approved July 2, 1864, as printed in vol. 13 of the United States Statutes, on page 356 and following.

4th item. That within the time allowed therefor the said Central Pacific Railroad Company of California duly filed its assent to the said act of July 1st, 1862, definitely fixed its railroad from Sacramento, in California, to a point at or near Ogden, Utah, and filed maps of the definite location thereof in the office of the Secretary of the Interior. The map of the definite location of that part of said road which extends from Monument Point to Ogden was accepted and approved by the Secretary of the Interior on October 20, 1868, and all of the said road extending from Sacramento to Ogden was constructed and accepted prior to the year 1870.

5th item. That on June 23rd, 1870, the said Central Pacific Railroad Company of California and the Western Pacific Railroad Company, under authority of the laws of California, duly amalgamated and consolidated together, vested all their franchises, rights, lands, and other properties in and reincorporated as the Central Pacific Railroad Company, and thereby the said railroad company became the owner, amongst other property, of all the lands granted to the said Central Pacific Railroad Company of California by the acts of Congress approved July 1st, 1862, and July 2nd, 1864, hereinbefore mentioned.

6th item. That the southwest quarter of section 29, in tp. 11 north, of range 2 west, of the Salt Lake meridian, United States survey, is part of an odd-numbered section of land lying in Box Elder county, Utah, and within ten miles on the north side of that portion of the said Central Pacific railroad which extends from Monument Point to Ogden, as the said road was definitely fixed, as shown upon the map of definite location, accepted and approved on October 20, 1868, as aforesaid, and as the road was constructed and accepted.

13 7th item. That the said land was surveyed by the United States and plat thereof filed in *in* the United States land office at Salt Lake City, the proper land office therefor, during the year 1869.

8th item. That the land is not and never was mineral or swamp land nor returned nor denominated as mineral land, and at that time when that portion of the road extending from Monument Point to Ogden was definitely fixed and the said map of definite location thereof accepted and approved, as aforesaid, the said land was agricultural in character, and there was no filing of any kind or description against the land; and the same was not swamp land

nor mineral land, nor was it included in any military or Indian reservation.

9th item. That on October 1st, 1870, the plaintiff duly made, executed, and delivered a mortgage covering all lands granted by the said acts of Congress to secure the payment of $10,000,000, payable on October 1st, 1890, which mortgage was duly acknowledged and certified as acknowledged on or about October 1st, 1870, and was duly recorded in the office of the county recorder of Box Elder county, Utah, March 12, 1873. On October 1st, 1890, the debt secured by the said mortgage had not been paid, and on that day the plaintiff duly made, executed, and delivered a new mortgage, covering the same lands, to secure payment of the same debt, which mortgage was duly acknowledged, certified, and recorded in the county recorder's office of Box Elder county during the year 1890 and remains unpaid.

BYRON GROO, a witness called on behalf of plaintiff and duly sworn, testified as follows:

I am the register of the United States land office in Salt Lake City, and as such have the custody of the records of that office and produce the same here in court. I produce from among
14 these letters a paper marked "List three," which is the selection list made by the Central Pacific railroad to the Salt Lake land office, Utah, and that list was filed in that office November 4, 1884, and shows a selection of the lands in controversy here for patent by the Central Pacific Railroad Company, and on that the costs and fees of surveying and other charges of the land office and surveyor's general's office were paid by the said railroad company.

This book which I produce is the official plat book of the records of the land office and shows the land in controversy. The lands in controversy were surveyed by the surveyor general on September 12, 1856, and the records of the land office show that the land was returned as agricultural land. From the records of the land office it shows that there were no filings made on or prior to the 20th day of October, 1868, of any kind or character whatever upon or against the land in controversy, and the land in controversy is not swamp land nor mineral land nor included in any military or Indian reservation, and the records of the land office, now in my possession and produced here, show that on or before October 20, 1868, there was not any pre-emption, homestead, or other claim or filing of any kind or character or description whatsoever upon or against this land in controversy.

On cross-examination the witness testified:

These records show that on May 29, 1869, declaratory statement numbered 802 was filed in the land office against the land in controversy, alleging a settlement to have been made thereon on April 23, 1869.

The land office in Salt Lake was not opened until April or May, 1869.

On June 20, 1896, a homestead entry of Andrew Madsen was filed in the land office against the land in controversy.

And thereupon Mr. Kimball, of counsel for defendant, stated
15 in connection with this cross-examination: I offer in evidence a United States patent dated August 21, 1896, issued to Andrew Madsen, signed by the President of the United States, and under the seal of the General Land Office; and I will state that this patent was delivered to Mr. Madsen.

And thereupon Mr. Rogers, of counsel for plaintiff, stated: I object to the offer as an offer of immaterial, irrelevant, and incompetent evidence.

And after argument upon the objection the court overruled the same; to which the plaintiff then and there duly excepted.

And the said patent was received in evidence, and was dated August 21, 1896, and purported to convey the land in controversy from the Government of the United States to the defendant, Andrew Madsen, based upon his homestead entry, instituted and made in the United States Land Office on January 20, 1896.

On redirect examination the witness testified:

This paper which I produce comes from *from* the record of the land office, is a declaratory statement; and the same was thereupon read and offered in evidence, and was as follows:

"*Declaratory Statement for Cases where the Lands are not Subject to Private Entry.*

I, Moroni Olney, of Box Elder county, Utah Territory, being a citizen of the United States and the head of a family, have on the 23rd day of April, 1869, settled and improved the S. W. ¼ of section 29, tp. 11 north, of range 2 west, in the district of lands subject to sale, at the land office in Salt Lake City, Utah, and containing 160 acres, which land has not yet been offered at public sale, and thus rendered subject to private entry, and I do hereby declare my intention to claim said tract of land as a pre-emption right under the provisions of said act of 4th September, 1841.

16 Given under my hand this 29th day of May, 1869.

(Signed) MORONI OLNEY.

In the presence of—
ABRAHAM HUNSAKER."

Thereupon the witness testified:

This record which I produce is the record and judgment docket of the decisions of the register and receiver of the United States land office at Salt Lake City. The defendant Madsen filed a contest in the land office at Salt Lake City against the selection list of this land for patent by the Central Pacific Railroad Company, and a hearing was ordered upon that contest, and the register and receiver decided, as is shown from this record and judgment docket, as follows: "We find that the tract in question, which is the S. W. ¼ of section 29, twp. 11 north, of range 2 west, of the Salt Lake meridian, was settled upon and occupied and claimed by a qualified entryman, to wit, Moroni Olney, prior to October 20, 1868, which therefore excepted

the land from the operation of the grant of Congress to the Central Pacific Railroad Company."

Thereupon, on redirect examination, the witness testified:

This decision of the register and receiver was appealed from to the Commissioner of the General Land Office, and he rendered his decision, affirming the decision of the register and receiver, and no appeal was ever taken from his decision, and I have here, from among the records of the land office, a written decision of the Commissioner of the General Land Office affirming the decision of the register and receiver.

And thereupon the paper was offered in evidence and read, and showed that the Commissioner of the General Land Office affirmed the decision of the register and receiver before mentioned upon the same grounds and for the same reasons.

17 Thereupon plaintiff offered and the court received in evidence a deed from the Central Pacific Railroad Company, as grantor, to the plaintiff, D. P. Tarpey, as grantee, dated August 17, 1891, duly executed, certified, and acknowledged and purporting to convey to the said Tarpey the lands in controversy.

Thereupon Mr. Rogers, of counsel for plaintiff, stated: "We now move the court to strike from the record the defendant Madsen's Exhibit One, being a patent purporting to convey to him the lands in controversy, dated August 21, 1896, upon the ground that the same is immaterial, irrelevant, and incompetent; and upon the further ground that it now appears affirmatively from the evidence and record in this case that the Land Department of the United States Government has made a mistake of the law in attempting to convey the land in controversy to the defendant in August, 1896, when at that time the same did not belong to the Government, but did belong to plaintiff, D. P. Tarpey, he having acquir*ing* title thereto by deed from the Central Pacific Railroad Company; and upon the further ground that the said patent was issued without authority of law; and on the further ground that it affirmatively appears from the evidence in this case that the Government of the United States had long prior to the date of the patent conveyed the lands in controversy to the Central Pacific Railroad Company, and that the title of the lands had by sundry mesne conveyances passed to the plaintiff; and on the further ground that the patent is only evidence of a junior title and is not evidence of the true title; and on the further ground that the undisputed evidence in this case shows that the true title to the land in controversy is not in the defendant, but is in the plaintiff."

And thereupon the court denied the said motion; to which the plaintiff then and there excepted.

18 And thereupon the defendant admitted that during all the times mentioned in the complaint he was in possession of the lands in controversy, and it was stipulated upon the trial that the amendments to the complaint may be taken as specifically denied by the defendant as far as it related to the title or claim of title of the defendant.

And thereupon plaintiff rested his case.

And then came the defendant, and by Mr. Kimball, his counsel, moved the court to enter a judgment of nonsuit against the plaintiff in this action upon the ground that the evidence shows the title to the land in controversy to be in the defendant, and that at the time of the beginning of this action the title to the land in controversy was in the United States of America; which motion for nonsuit was by the court allowed, rendered, and entered; to which ruling the plaintiff then and there duly excepted.

And thereupon a judgment of nonsuit was duly entered in said action dismissing the plaintiff's complaint and awarding the defendant judgment for his costs.

And thereupon the court duly made and entered an order giving the plaintiff 60 days from the date thereof in which to prepare, serve, and present his bill of exceptions.

19 *Assignment of Errors.*

The plaintiff assigns that the court erred in overruling the motion to strike from the record the Defendant's Exhibit One, being the patent theretofore introduced in evidence by the defendant.

2. That the court erred in granting the defendant's motion of judgment of nonsuit.

And whereas these matters and things not otherwise appearing of record, this bill of exceptions is duly presented to the court within the time allowed therefor, and by consent of counsel for defendant is duly allowed and certified as being full, true, and correct.

January 9, 1898.

CHARLES H. HART, *Judge.*

The foregoing bill of exceptions is agreed to.

EVANS & ROGERS,
Attorneys for Plaintiff.
B. H. JONES,
KIMBALL & KIMBALL,
Attorneys for Defendant.

20 In the District Court of the First Judicial District of the State of Utah in and for the County of Box Elder.

D. P. TARPEY, Plaintiff,
v.
ANDREW MADSEN, Defendant.

Please take notice that the plaintiff in the above-entitled action hereby appeals to the supreme court of this State from the judgment herein made and entered in the said district court on the 18th day

f November, 1897, in favor of the defendant in said action and against the plaintiff and from the whole and every part thereof.

L. R. ROGERS,
D. EVANS,
Attorneys for Plaintiff.

February 4th, 1898.

To the clerk of said court and to Messrs. B. H. Jones & Kimball & Kimball, attorneys for defendant.

Filed Feb. 4, 1898.

21 D. P. TARPEY, Plaintiff,
v.
ANDREW MADSEN, Defendant.

To the honorable supreme court:

We, the undersigned, attorneys for the plaintiff and defendant in the foregoing action, do hereby certify that this transcript is correct.

And we further certify that the appellant has duly and within time filed an undertaking on appeal sufficient in form and amount.

Feb. 4, 1898.

L. R. ROGERS,
D. EVANS,
Attorneys for the Plaintiff.
B. H. JONES,
KIMBALL & KIMBALL,
Attorneys for Defendant.

Marked: Filed February 11, 1898. Lilburn P. Palmer, clerk supreme court, Utah.

22 In the Supreme Court of the State of Utah, Regular May Term.

MAY 13, 1898.

D. P. TARPEY, Appellant,
v.
ANDREW MADSEN, Respondent.

This cause, coming on regularly to be heard, was argued by Mr. L. R. Rogers, in behalf of the appellant, by Mr. B. H. Jones, in reply, was submitted and by the court taken under advisement.

Title of Court and Cause.

JULY 1, 1898.

This cause, having been heretofore argued and submitted, and the court being sufficiently advised thereon, it is now here considered, ordered, and adjudged that the judgment be, and the same is hereby, affirmed.

23 In the Supreme Court of the State of Utah.

D. P. TARPEY, Appellant,
v.
ANDREW MADSEN, Respondent.

ZANE, *C. J.:*

This is an action to try the title and to recover the possession of the southwest quarter of section 29, in township 11 north, ranger 2 west, of the Salt Lake meridian.

The plaintiff claims title by virtue of a deed of conveyance by the Central Pacific Railroad Company to him and the following grant of the United States to that company: "That there be, and is hereby granted to the said company, for the purpose of aiding in the construction of said railroad and telegraph line, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores thereon, every alternate section of public land, designated by odd numbers, to the amount of five alternate sections per mile on each side of said railroad, on the line thereof, and within the limits of ten miles on each side of said road, not sold, reserved, or otherwise disposed of by the United
24 States, and to which a pre-emption or homestead claim may not have attached, at the time the line of said road is definitely fixed." 12 U. S. Stat. at Large, p. 492.

Afterwards Congress passed another act, in force July 2, 1864, to amend the first-mentioned act of 1862. The third section of this latter act contains the following provision: "Any lands granted by this act, or the act to which this is an amendment, shall not defeat or impair any pre-emption, homestead, swamp-land, or other lawful claim, or include any Government reservation or mineral lands, or the improvements of any *bona fide* settler." 13 U. S. Stat. at Large, p. 358.

The exception from the grant in the last law is more comprehensive than the one contained in the first. It declares the grant shall not defeat or impair any pre-emption, homestead, or other lawful claim, nor include the improvements of any *bona fide* settler.

The first act excepted from the grant all lands to which homestead or pre-emption claim should attach before the line of the road was definitely fixed, while the latter act excepted not only pre-emption and homestead claims, but all other lawful claims to the land, and all improvements of *bona fide* settlers on the land as well.

The line of the road of defendant's grantor, at the point in question, was definitely fixed and survey thereof was filed in the office of the Secretary of the Interior on October 20, 1868. The land in dispite is part of a section located within the twenty-mile limit and is designated by an odd number, and had not been sold, reserved, or otherwise disposed of by the national Government, nor had a homestead claim attached to it. It was within the grant unless a pre-emption right had lawfully attached to it at the time the
25 line of the road was definitely fixed and the survey thereof had been filed in the office of the General Land Office.

Section 2 of an act of Congress approved July 16, 1868, and in

force on that day, made the late Territory of Utah a land district and authorized the President to appoint a surveyor general, a register, and a receiver of public moneys for the same, with the same powers and duties and entitled to the same compensation prescribed by law in relation to land offices of the United States in the Territories. 15 U. S. Stat. at Large, 19.

Section 3 of the same act provides "that the Secretary of the Interior is hereby authorized to locate said offices of surveyor general, register and receiver of public moneys at some suitable place in the Territory;" and section 4 extended the pre-emption, homestead, and other laws of the United States applicable to the disposal of the public lands over the Utah district.

It appears from the record that one Moroni Olney, a citizen of the United States and the head of a family, settled upon the land in dispute after July 16 and before October 20, 1868, intending to claim a pre-emption right to it, and that he was in the actual possession thereof upon the last-named day, but that he did not make known his claim in writing to the register of the land office until May 29, 1869, because the register did not open his office until that time; that he did make known his claim in writing to the register on that day, in which he described the land in dispute.

Sec. 2265, Rev. Stat. U. S., 1878 (2nd ed.), provides "that every claimant under the pre-emption law for land not yet proclaimed for sale is required to make known his claim in writing to the register of the proper land office within three months from the time
26 of the settlement, giving the designation of the tract, and the time of settlement; otherwise his claim shall be forfeited, and the tract awarded to the next settler in the order of time on the same tract of land who has given such notice, and otherwise complied with the conditions of the law."

Sec. 2267, *id.*, requires the proof and payment for the lands claimed within thirty months after the date prescribed therein for filing the declaratory notice.

Sec. 2270, *id.*, declares that "Whenever the vacancy of the office either of register or receiver, or of both, renders it impossible for the claimant to comply with every requisite of the pre-emption laws within the appointed time, such vacancy shall not operate to the detriment of the party claiming in respect to any matter essential to the establishment of his claim; but such requisition must be complied with within the same period after the disability is removed, as would have been allowed had such disability not existed."

After July 16, 1868, Utah Territory constituted a land district, and the offices of surveyor general, register, and receiver were created, but the appointments were not made and the offices opened until May of the following year, but the pre-emption, homestead, and the other laws of the United States applicable to *to* the disposal of public lands were extended over the district when the law took effect on the 16th day of July, mentioned above, and we must regard a vacancy as existing in those offices until the officers entered upon the discharge of their duties in the following May. The land in the district was not proclaimed for sale until after the last-named

date, and the pre-emption claimant could not make known his claim in writing to the register until he entered upon his duties, and the pre-emptor had three months after he did within which to do so.

27 It appears from the record that Olney filed his declaratory statement with the register in less than a month after the office of register was filled. Having settled upon the land in question before the railroad company established its line of definite location and filed its survey or map thereof in the General Land Office, and having filed his declaratory statement with the register of the land office of the district within the time allowed by law, we must hold that Olney's pre-emption claim had attached to the land in question and existed thereon before the right of the Central Pacific railroad became fixed, and that the land in dispute did not pass by the grant relied upon.

As we have seen, the act of Congress in force on July 16, 1868, created a land district consisting of the late Territory of Utah, and authorized the appointment of a surveyor general, register, and receiver of public moneys, with the same powers and subject to like duties given to and imposed upon like officers in the other Territories, and the same law extended the pre-emption, homestead, and other laws of the United States applicable to the disposal of its public lands over it. After the creation of the land district and the extension of such laws over it, persons having the qualifications mentioned in the law were authorized and had the lawful right to settle upon the public lands therein subject to pre-emption and the right to improve the same, and by so doing they acquired lawful rights thereto. This, it appears from the record, Moroni Olney *done*, and it appears he complied with the rwquirements of the law as far as possible before the register of the land office was appointed, and that within a month thereafter he filed the declaratory statement the law required.

28 When the acquisition of a right by an individual depends upon an act required of him within a specified time, and he is deprived by the Government or person exacting it of the opportunity to do it then, but does it as soon as an opportunity is afforded later, the law will accept such performance and secure him the right. Likewise when an individual in the prosecution of a lawful right does everything required of him as far as he is able, and fails in some particular because a public officer fails to discharge a duty towards him, the law will protect him. And the law having provided, as we have seen, that Mr. Olny might settle on the land in dispute and acquire a pre-emption right to it, upon filing with the register of the land office of the district, within three months after such settlement, his declaratory statement, and there be-ng no register until the expiration of six months thereafter to whom he could deliver it, and he having delivered his statement about the expiration of that time, the law protected his pre-emption right.

Baty *v.* Sale, 43 Ill., 351.
Kile *v.* Tubbs, 23 Cal., 432.
Lytle *v.* State of Arkansas, 50 U. S., 314.
The Yosemite Valley Case, 15 Wall., 77.

In the case of Kile *v.* Tubbs, *supra*, the court said: "In this case it appears the plats of the U. S. surveys of this land have not been sent to the proper land office, so that it is out of the power of the defendant to file his notice of claim to pre-emption, or to enter and purchase the land under the United States laws; so he has done all in his power, and has lost no rights acquired under those laws."

In the case of Baty *v.* Sale, *supra*, it was held, where land was temporarily withdrawn from the market, and a party had filed
29 his declaration of an intention to pre-empt it, the officers of the Land Office did right in excluding the time the land was not subject to entry in computing the year within which he had the right to make his proof and enter the land.

When Olney, the pre-emptioner in this case, filed his declaratory statement his right must be deemed in law to relate to the date of his settlement on the land in dispute. Therefore he had a lawful claim upon it when the grant to the railroad took effect, and the land in dispute was not included in it.

The grant of land to the Central Pacific Railroad Company took effect when the line of definite location of its road was made and the survey filed in the General Land Office, but it did not include the land in dispute, because it was at that time subject to the lawful right of Olney, a pre-emptor. But when he afterwards failed to comply with the requisites imposed in order to obtain a title the land became a part of the public lands of the United States and was thereafter subject to the homestead entry of the defendant, Andrew Madsen, or to other entry or pre-emption. It did not vest in the railroad company. Its grant was *in præsenti*, and such land as was excepted at the time it took effect did not pass to it afterwards. When Olney afterwards abandoned or lost his right the land did not become subject to the operation of the grant.

Hastings, etc., Railroad Co. *v.* Whitney, 132 U. S., 357.
Kansas Pacific R'y Co. *v.* Dunmeyer, 113 U. S., 629.

In view of the facts appearing from the record we hold the lands in dispute were subject to entry by the defendant, Andrew Madsen, on June 20, 1896, and that the patent of August 21, 1896, passed the title to him.

The judgment is affirmed.

We concur.
BARTCH, *J.*
HILES, *Dist. Judge.*

30 In the Supreme Court of the State of Utah.

D. P. TARPEY, Plaintiff and Appellant,
vs.
ANDREW MADSEN, Defendant and Respondent. } Application for Writ of Error.

Now comes the defendant, D. P. Tarpey, and says that in the final judgment rendered by the supreme court of the State of Utah herein on the 1st day of July, 1898, and in the proceedings had prior

thereto certain errors were committed to the prejudice of said plaintiff, which will more in detail appear from the assignment of errors to be filed as a part of this petition, and further says that in the final judgment and decree of the first judicial district court of Box Elder county, Utah, in this cause a decision was had against the validity of certain statutes of the Congress of the United States and against the title of the plaintiff to certain lands situated in the State of Utah to which he claimed title under certain statutes of the United States—that is to say, the Pacific Railroad land grants—which was drawn in question by said litigation, the plaintiff claiming that the lands mentioned and described in said action were lands which were granted to the Central Pacific Railroad Company of California under the terms and provisions of the said Pacific Railroad land grants, and the defendant claiming and contending that the title of
31 the United — did not pass to the said Central Pacific Railroad Company of California under any or either of said land grants and acts of Congress, and the plaintiff claiming to be the grantee of the said Central Pacific Railroad Company of California.

That the decision of the first judicial district court, wherein the said cause was tried, was against the authority and validity of the claim of the plaintiff, and the decision of the supreme court was against the authority and validity of the claim of the said plaintiff.

Wherefore this plaintiff prays that a writ of error may issue in his behalf to the supreme court of the State of Utah for the correction of the errors so complained of, and that the transcript, papers, and records in this cause, together with the opinion of this honorable court herein, all duly authenticated, may be sent to the Supreme Court of the United States.

July 16, 1898.

LINDSAY R. ROGERS,
Att'ys for Plaintiff, D. P. Tarpey.

32 In the Supreme Court of the State of Utah.

D. P. TARPEY, Plaintiff and Appellant,
v.
ANDREW MADSEN, Defendant and Respondent.

Allowance of Writ of Error.

On this 16th day of July, 1898, came the said D. P. Tarpey, plaintiff, by his attorney of record herein, Lindsay R. Rogers, and filed and presented herein a petition praying for the allowance of a writ of error intending to be urged by him; praying also that a duly authenticated transcript of the record, proceedings, papers, and opinion upon which the judgment herein was rendered may be sent to the Supreme Court of the United States, and that such full and fair proceedings may be had as may be proper in the premises.

In consideration thereof I, Charles S. Zane, chief justice of the supreme court of the State of Utah, do hereby allow the writ of

error upon the plaintiff giving bond according to law in the sum of $500.00.

C. S. ZANE,
Chief Justice.

Marked: Filed July 19, 1898. L. P. Palmer, clerk supreme court, Utah.

33 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the supreme court of the State of Utah, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a suit which is in the supreme court of the State of Utah, before you, being the highest court of law or equity of said State in which a decision could be had in said State between D. P. Tarpy, plaintiff, and Andrew Madsen, defendant, wherein was drawn in question construction of statutes of the Congress of the United States and your decision was against the title specially set up and claimed to the real property in dispute in said action which the plaintiff claimed title to by virtue of land grants from the United States to the plaintiff's predecessor in interest, evidenced by acts of Congress of the United States, and your decision was against the validity of said title specially set up and claimed under such statutes, and manifest error hath happened, to the great damage of said D. P. Tarpey, as by his complaint appears, we, being willing that error, if any hath happened, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington within 60 days of the date hereof, *and* that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done
34 therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Hon. Melville W. Fuller, Chief Justice of the said Supreme Court of the United States, this 16th day of July, in the year of our Lord one thousand eight hundred and ninety-eight.

Seal United States Circuit Court, District of Utah.

JERROLD R. LETCHER,
Clerk U. S. Circuit Court, District of Utah,
By JOHN W. CHRISTY, *Deputy.*

Allowed by—
C. S. ZANE,
Chief Justice of the Supreme Court of the State of Utah.

[Endorsed:] 911. Tarpey *vs.* Madsen. Writ of error. Filed Jul- 19, 1898. Lilburn P. Palmer, clerk supreme court, Utah.

35 In the Supreme Court of the State of Utah.

D. P. TARPEY, Plaintiff and Appellant,
vs.
ANDREW MADSEN, Defendant and Respondent. } Assignments of Error.

1. The court erred in affirming the judgment of the trial court.

2. The court erred in holding that the title to the land in dispute did not pass from the United States of America to the Central Pacific Railroad Company of California under the acts of Congress of July 1, 1862, and July 2, 1864, said acts being found and printed in volume 12 of the United States Statutes, pages 289 and following, and volume 13 of the United States Statutes, on page 356 and following, respectively.

3. The court erred in holding and deciding that the mere residence, settlement, and cultivation of the land in dispute by Moroni Olney prior to October 20, 1868, exempted the land and the title thereto from passing from the United States to said railroad company.

4. The court erred in holding and deciding that the lands in dispute were public lands of the United States, and that such were subject to entry by the defendant, Andrew Madsen, on June 20, 1896.

36 5. The court erred in holding and deciding that the patent of August 21, 1896, from the Government of the United States to Andrew Madsen passed any title whatever to him.

July 16, 1898.

LINDSAY R. ROGERS,
Attorney for Plaintiff, D. P. Tarpey.

[Endorsed:] 911. Tarpey *vs.* Madsen. Assignment of error. Filed Jul- 19, 1898. Lilburn P. Palmer, clerk supreme court, Utah.

37 In the Supreme Court of the United States.

D. P. TARPEY, Plaintiff and Appellant,
vs.
ANDREW MADSEN, Defendant and Respondent. } Citation.

To Andrew Madsen, defendant in error:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden in Washington, in the District of Columbia, within 60 days of the date of this citation, pursuant to writ of error filed in the clerk's office of the supreme court of the State of Utah, at Salt Lake City, Utah, wherein D. P. Tarpey is plaintiff in error and you, the said Andrew Madsen, are defendant in error, to show cause, if any there be, why the judg-

ment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this the 16th day of July, 1898.

C. S. ZANE,
Chief Justice Supreme Court, State of Utah.

37½ I hereby acknowledge due and legal service of the within citation this 22nd day of July, 1898.

B. H. JONES,
Attorney of Record for Defendant, Andrew Madsen.

38 In the Supreme Court of the State of Utah.

D. P. TARPEY, Plaintiff and Appellant,
v.
ANDREW MADSEN, Defendant and Respondent. } Bond.

Know all men by these presents that we, D. P. Tarpey, as principal, and James McTerney and Wm. Keyting, as sureties, are held and firmly bound unto the defendant, Andrew Madsen, in the full and just sum of $500.00, to be paid to said defendant, Andrew Madsen, his heirs or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs and personal representatives, jointly and severally, by these presents.

Sealed with our seals and dated this 19th day of July, 1898.

Whereas lately, in the supreme court of the State of Utah, in the suit depending in said court between said plaintiff, D. P. Tarpey, and the said defendant, Andrew Madsen, a judgment was rendered against the said Tarpey, and he having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to said Andrew Madsen, citing and admonishing him to be and appear at a term of the Supreme Court of the United States, holden at the seat of government, at Washington, within 60 days of the date of said citation:

39 Now, the condition of the above obligation is such that if said D. P. Tarpey shall prosecute said writ of error to effect and answer all damages and costs if he fails to make the plea good then the obligation to be void; else to remain in full force and virtue.

D. P. TARPEY. [SEAL.]
JAMES McTERNEY. [SEAL.]
WM. KEYTING. [SEAL.]

Sealed and delivered in the presence of—
ERNEST WILLIAMS.

Approved by—
C. S. ZANE,
Chief Justice of the Supreme Court of the State of Utah.

40 UNITED STATES OF AMERICA, }
State of Utah, } ss:

I, Lilburn P. Palmer, clerk of the supreme court of the State of Utah, in pursuance of a writ of error allowed in the case wherein D. P. Tarpey is plaintiff in error and Andrew Madsen is defendant in error, do return attached hereto a transcript of the record and proceedings, opinion, bond, and order allowing writ of error, together with the original citation, writ of error, and assignment of errors, all in and of said court and cause, to the Supreme Court of the United States; and I hereby certify that said attached transcript of said record and proceedings, opinion, bond, and order allowing writ of error is a full, true, and correct copy of the several originals thereof now on file or of record in my office.

In witness whereof I have hereunto set my hand and affixed the seal of the supreme court of the State of Utah, this 9th day of August, A. D. 1898, at Salt Lake City, Utah.

LILBURN P. PALMER,
Clerk Supreme Court of Utah.

Endorsed on cover: Case No. 16,961. Utah supreme court. Term No., 376. D. P. Tarpey, plaintiff in error, *vs.* Andrew Madsen. Filed August 22d, 1898.

No. 376.

Office Supreme Court U. S.
FILED
MAY 5 1899
JAMES H. McKENNEY,
Clerk.

IN THE

Supreme Court of the United States.

D. P. TARPEY,
Plaintiff in Error,
vs. No. 376.
ANDREW MADSEN.
Defendant in Error,

MOTION.

Comes now the plaintiff in error by his Attorneys Lindsay R. Rogers and Wm. T. S. Curtis and moves the Court to enforce the stipulation to submit the above case heretofore filed herein by counsel for the respective parties.

LINDSAY R. ROGERS,
WM. T. S. CURTIS,
Attorneys for Plaintiffs in Error.

IN THE SUPREME COURT OF THE UNITED STATES.

D. P. TARPEY,
Plaintiff in Error
vs. No. 376.
ANDREW MADSEN,
Defendant in Error.

STIPULATION.

It is hereby stipulated and agreed by and between the parties to this cause and their respective attorneys of

record herein, that this cause shall be, and is, hereby submitted upon briefs, under provisions of Rule 20, of this court, providing for submission during the first ninety days of the term.

LINDSAY R. ROGERS,
Attorney for Plaintiff in Error.
B. H. JONES,
Attorney for Defendant in Error.

Dated Sept. 20th, 1898.

IN THE SUPREME COURT OF THE UNITED STATES.

D. P. TARPEY,
Plaintiff in error.
vs.
ANDREW MADSEN,
Defendant in error.
} No. 376.

You will please take notice that on Monday, the first day of May, 1899, at the Court Room of this Honorable Court, we will call up the plaintiff in error's motion, that this cause be submitted to the consideration and determination of the Court in accordance with the written stipulation on file in the office of the Clerk thereof.

L. R. ROGERS,
WM. T. S. CURTIS.
Attorneys for plaintiff in error.

Dated April 25th, 1899.

To B. H. Jones, Esq., Attorney for defendant in error and James H. McKinney, Clerk of the above entitled Court.

STATE OF UTAH, }
County of Box Elder. } ss.

Edward R. Chase, being duly sworn says; that he is a male citizen of the United States over the age of 21 years and is not interested in the above entitled action. That he is personally acquainted with B. H. Jones, Esq., the attorney of record for the defendant in error in the above entitled action, and that at Brigham City, in said Box Elder County and State of Utah, and on the 26th day of April, 1899, he personally served the above and foregoing notice upon the said B. H. Jones, Esq., by then and there delivering personally to the said B. H. Jones, Esq., a true copy thereof.

EDWARD R. CHASE.

Subscribed and sworn to before me this 26th day of April, 1899.

C. M. SQUIRES.
Justice of Peace.

(*Endorsement.*)

Service of a copy accepted this 26th day of April, 1899.

B. H. JONES;
Attorney for Defendant in error.

119

No. 376.

Brief of Rogers for P. E.

Office Supreme Court U. S.
FILED
JAN 5 1899
JAMES H. McKENNEY,
Clerk.

No. 376. Filed Jan. 5, 1899. R. 16,961.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

D. P. TARPEY,
Plaintiff in Error,

vs.

ANDREW MADSEN,
Defendant in Error.

Brief of Plaintiff in Error.

L. R. ROGERS,
Attorney for Plaintiff in Error.

Filed this ..... *day of* ..... *1898.*

..... *Clerk.*

By .....
Deputy Clerk.

PRESS OF H. B. CROCKER CO., S. F.

No. 376.

Supreme Court of the United States,

OCTOBER TERM, 1898.

D. P. TARPEY,
Plaintiff in Error,

vs.

ANDREW MADSEN,
Defendant in Error.

Reg. No. 16,961.

Brief of Plaintiff in Error.

This case comes here by writ of error to the Supreme Court of the State of Utah.

STATEMENT.

The case is in *ejectment*, to recover possession of one hundred and sixty acres of land in Utah, part of an odd-numbered section within the limits of the land-grant made to the Central Pacific Railroad Company of California by the Acts of Congress approved on July 1st 1862 (12 Stat. 489) and

July 2nd 1864 (13 Stat. 356); and is based on the plaintiff's (plaintiff in error here) claim of ownership by title in fee, under mesne conveyance from the said grantee Company (Tr. p. 1, fo. 1, 2).

Plaintiff's title.

The congressional Act of July 1st 1862, hereinbefore referred to, authorized the Central Pacific Railroad Company of California to construct a railroad from Sacramento to the eastern boundary of California (Sec. 9); and to aid in the construction thereof section 3 of the said Act provided:

> "That there be, and is hereby, granted to the said Company, * * * every alternate section of public land, designated by odd-numbers, to the amount of five alternate sections per mile on each side of said railroad, on the line thereof, and within the limits of ten miles on each side of said road, not sold, reserved, or otherwise disposed of by the United States, and to which a *pre-emption* or homestead *claim may not have attached*, at the time the line of said road is *definitely fixed:* Provided, that all mineral lands shall be excepted from the operation of this Act."

The Act of July 2nd 1864, hereinbefore referred to, authorized the Central Pacific Railroad Company to continue its railroad eastward to the Missouri River, or until it connected with the constructed road of the Union Pacific Railroad Company (Sec. 9). Section 4 of this Act enlarged the

land grant made by the Act of 1862—but such enlargement is immaterial here, as the land in suit lies within the limits of the grant made by the Act of 1862 (Tr. p. 7, 6th Item). The same section (4) of the Act of 1864 also provides that

> "Any lands granted by this Act, or the Act to which this is an amendment, shall not *defeat or impair* any *pre-emption*, homestead, swamp land, or other lawful *claim*, nor include any Government reservation or mineral lands, or the improvements of any bona fide settler, or any lands returned and denominated as mineral lands."

The Central Pacific Railroad Company was duly incorporated, empowered to construct the railroad contemplated, and authorized to receive the land-grants made by the said congressional Acts (Tr. pp. 6, 7 fo. 11).

Within the time allowed therefor the said Company duly assented to the Act of 1862, definitely fixed its railroad from Sacramento to a point near Ogden, and filed maps of the definite location thereof with the Secretary of the Interior. The land in suit is opposite, and co-terminous with, that portion of the road extending from Monument Point to Ogden; the map of the definite location of which was accepted and approved by the Secretary of the Interior on *October 20th 1868* (Tr. p. 7, fo. 12).

The land in suit was surveyed in 1856 (Tr. p. 8, fo. 14), and a plat thereof filed in the United States

land-office at Salt Lake City during the year 1869; and at the date the said Company definitely fixed the section of its railroad opposite thereto (October 20th 1868), the land in suit was not within any exception to the land-grant made by the congressional Acts of 1862 and 1864 (Tr. p. 7, fo. 13).

Thereafter the Central Pacific Railroad Company became the owner of the land grant made by the said Acts to the Central Pacific Railroad Company of California (Tr. p. 7, fo. 12); and on November 4th 1884 the Central Pacific Railroad Company was permitted to and did select the land for patent, and pay all the costs and fees of surveying and patenting the same (Tr. 8, fo. 14).

The Central Pacific Railroad Company sold and conveyed the land to the plaintiff, by deed dated August 17th 1891 (Tr. p. 10, fo. 17).

Defendant's title.

The United States land-office at Salt Lake City was not opened until April or May 1869 (Tr. p. 8, fo. 14)—five or six months after the Central Pacific definitely fixed the section of its road opposite the land in suit.

The Salt Lake land-office records show a pre-emption declaratory statement in the name of Moroni Olney, for the land in suit, dated May 29th 1869; wherein benefit of settlement is *claimed* from April 23rd 1869 (Tr. p. 9, fo. 15).

On January 20th 1896 the defendant filed his homestead claim for this land (Tr. p. 8, fo. 14); and such proceedings were had in pursuance thereof as that on August 21st 1896 a patent was issued by the United States purporting to convey the land in suit to the defendant (Tr. pp. 8, 9, fo. 14, 15). In the contest between the Central Pacific Railroad Company and the defendant Madsen, initiated by the said homestead filing of Madsen, the land-officers of the United States found and decided as follows:

> "We find that the tract in question * * * was settled upon and occupied and claimed by a qualified entryman, to-wit, Moroni Olney, prior to October 20th 1868; which therefore excepted the land from the operation of the grant of Congress to the Central Pacific Railroad Company."

The defendant's patent, issued in pursuance of his homestead and under authority of this decision, was offered in evidence upon cross-examination of plaintiff's witness Byron Groo, Register of the Salt Lake land-office. The plaintiff objected to its admission, the Court admitted it in evidence against the objection, and the plaintiff excepted (Tr. p. 9, fo. 15). Thereafter the plaintiff moved to strike the patent from the record, the Court denied the motion, and the plaintiff excepted (Tr. p. 10, fo. 17); and thereupon the defendant's motion for judgment of non-suit was allowed, ren-

dered and entered—to which the plaintiff excepted (Tr. p. 11, fo. 18).

ERRORS ASSIGNED.

Unless the occupancy and declaratory statement of Moroni Olney excepted this tract from the land-grant made to the Central Pacific by the congressional Act of July 1st 1862, the plaintiff's grantor, by *definitely fixing* its railroad on *October 20th 1868*, perfected title in fee to the same, which attached as of the date of the grant (July 1st 1862), and cut off intervening claims (if, otherwise, any existed); hence, unless this tract was so excepted, the defendant's patent was *void*, for that the United States *had no interest to transfer*.

The plaintiff claims that the tract in suit is not within any exception to, but was granted by, the said Act; and that, therefore, the trial Court erred in **(a)** admitting the defendant's patent in evidence; **(b)** over-ruling the plaintiff's motion to strike the said patent from the record; and (c) granting the defendant's motion for a non-suit. And the plaintiff claims that the Supreme Court of Utah erred

1st. In deciding that the title to the land in suit did not pass to the Central Pacific Railroad Company of California by the congressional Acts of July 1st 1862 (12 Stat. 89) and July 2nd 1864 (13 Stat. 356).

2nd. In deciding that the tract in suit was excepted from the land-grant made by the said Acts of Congress, by the settlement, residence, cultivation and filing of Moroni Olney.

3rd. In deciding that the tract in suit was public land of the United States, subject to the defendant's homestead at the time it was made.

4th. In deciding that the patent from the United States to the defendant, conveyed the title, or any title, for the said land.

5th. In affirming the judgment of the trial Court.

THE FEDERAL QUESTIONS.

The writ of error here is to the Supreme Court of the State of Utah, the highest Court of that State in which a decision in the case could be had, to correct a final judgment of that Court, in a case wherein the plaintiff specially set up a title to the land in suit under statutes of the United States; and the decision is against the title so set up.

The record shows that the plaintiff specially set up title in himself by mesne conveyance of the land in suit from the Central Pacific Railroad Company of California, to which Company a land-grant was made by the Acts of Congress approved July 1st 1862 (12 Stat. 489) and July 2nd 1864 (13

Stat. 356); the plaintiff claiming (which claim was specially set up throughout) that under the true construction of the said Acts a fee title to the land involved was granted by them to his grantor Company—whereas the decision and final judgment for review herein is against the plaintiff's title, through (as plaintiff claims) an erroneous construction of those Acts of Congress.

The federal questions thus arising are

1st. Is the tract in suit excepted from the land-grant made by the said Acts, by the record of a pre-emption declaratory statement filed on May 29th 1869, designating this land and April 23rd 1869 as the date of settlement *claimed* (the railroad having been definitely fixed on October 20th 1868)?

2nd. Is this tract excepted from the said land-grant because *settled upon* and occupied by Moroni Olney prior to the date the railroad was definitely fixed—notwithstanding his filing *did not claim* the benefit of settlement prior to April 23rd 1869?

ARGUMENT.

Nature of plaintiff's grant.

The grant under which the plaintiff claims, conferred by the words "*there be, and is hereby granted,*"

transferred an *immediate interest* in such odd-sections within the prescribed distances of the contemplated railroad when "definitely fixed," as were not by the terms of the Acts excepted or reserved from the lands granted **(U. S. v. S. P. R. R. Co., 146 U. S. 570)**; and the interest thus transferred was a *legal title*, which will maintain ejectment **(Deseret Salt Co. v. Tarpey, 142 U. S. 241)**.

Until the railroad was "definitely fixed" it could not be known what particular sections were granted, or what particular sections were reserved from the grant; as the railroad when "*definitely fixed*" established the line from which the grant was to be measured, and the date at which the *exceptions* from the grant *became operative*. In other words, definite location of the road fixes the boundaries of the grant, identifies the lands granted and the lands excepted within those limits, and attaches the grant to the odd-sections within those limits and not excepted from the grant, as effectually as if such un-excepted sections were specifically described in the granting Act **(Mo. R'y Co. v. Kans. Pac., 97 U. S. 491)**.

The sense of which, applied to this case, is, that by the definite location of its road, on *October 20th 1868*, the Central Pacific fixed the boundaries of its grant under which the plaintiff claims, *identified* the odd-sections (both *granted* and *excepted*)

within those limits, and on that day perfected in itself a *legal title* to such odd-sections within the granted limits as were not on that day included by an exception from the lands granted; which title *attached*, by relation of dates, as of the date of the granting Act, "so as to cut off all intervening claimants, except in the case where reservations were specially made in the Act" **(Mo. R'y Co. v. Kans. Pac., 97 U. S., 491).**

Exceptions in the Act of 1862.

The Act of July 23rd 1866 (14 Stat. 210) granting lands to the State of Kansas in aid of railroad building, expressly excepts from the grant lands to which "the right of pre-emption or homestead *settlement* has attached" at the date the road is definitely fixed; and a large number of the railroad land-grants, in words of similar import, reserve lands found *occupied by settlers* at the time of definite location, from the operation of the grant.

But the Central Pacific Act of 1862 contains no exception of lands to which the right of *settlement* may have attached, nor reservation of lands occupied by settlers, at the time of definite location; the corresponding provision of the Central Pacific Act under consideration is an exception from the grant of lands "to which a *pre-emption or homestead claim* is found *attached* at the time the line of said road is definitely fixed."

The decision of this case, therefore, goes with the true answer to the question, Was "a pre-emption or homestead *claim* found *attached*" to the land in suit on October 20th 1868, the time the line of railroad was definitely fixed?

The terms of the statute are absolute—not qualified, or left in anywise dependent upon contingencies; and the answer to this question must be found in the *facts existing on October 20th 1868*—not in what did, or might have, happened afterward. If on that day a "pre-emption *claim*" had "attached" to it, the land was thereby excepted from, and no title could thereafter be acquired to it under, the Central Pacific's grant; and if on that day a "pre-emption *claim*" was not found "*attached*" to it, title in fee for the land passed to the Central Pacific, as of the date of its grant, and all intermediate claims that might otherwise be filed thereafter were cut off. The definite location of its road vested a fee title in the Company to the lands to which a pre-emption claim was not at that time attached; and there was no provision in the Act that a pre-emption claim, if filed thereafter, should operate a defeasance of, or otherwise divest, the title vested by definite location.

The record shows that no filing, of any kind, existed for the land on October 20th 1868—but that on May 29th 1869 the Moroni Olney pre-emp-

tion statement was filed, designating the land in suit for a pre-emption claim, and April 23rd 1869 as the date of settlement *claimed*; the date of filing being seven months, and the date of settlement six months, *after* definite location of the Company's road. This is the pre-emption *claim* declared by Olney, who best knew when it originated, for himself; and it is absurd to say that such filing, made in May 1869, had "attached" in October of the year before.

Olney's filing was made under, and derives its significance from, Section 2265 of the United States Revised Statutes—taken from the pre-emption Act of 1841; which section requires the pre-emption claimant to file a written statement of his claim, "giving the designation of the tract and time of settlement." It reads as follows:

> "Every claimant under the pre-emption law for land not yet proclaimed for sale, is required to make known his *claim* in writing to the register of the proper land-office, within three months from the time of settlement, giving the designation of the *tract* and the *time of settlement*; otherwise the claim shall be forfeited" etc.

Exercising the authority conferred by this section, on May 29th 1869 Olney made "known his *claim* in writing," designating the land in suit as the "tract" claimed, and April 23rd 1869 as "the

time of settlement" claimed; and until the filing of that declaratory statement in the proper land-office there was no "pre-emption *claim*" to have "attached." It is said that as Olney was occupying the land on October 20th 1868, he *might* have claimed settlement on that day. True, but it is the *claim he did file*, not a claim he might have but did not file, that is to be considered—he might have designated other *land*.

It will be remembered that this is an *action at law* between the Central Pacific's grantee and the defendant Madsen, who is a stranger to and makes no claim of privity with Olney or his filing; it is not a proceeding wherein Olney is seeking to reform the record of his claim, or equitable relief from consequences of delay in filing, or mistake in date of settlement claimed. Olney, with free hands, made known his claim—and he was content with it as made; but the defendant, a stranger, years after the plaintiff had purchased the land from the Central Pacific on the face of the record of Olney's claim, bears witness that Olney settled prior to October 20th 1868, instead of as claimed by him in his declaratory statement—and upon that proof the land-officers patented the tract to the defendant. But, as before said, this is an action at law, wherein the *record* of Olney's *claim* stands as he made it—filed on May 29th 1869, claiming settlement on April 23rd of that year;

and if it be true (as we contend) that the *record*, the filing, is the "pre-emption *claim*," then it is immaterial when Olney settled—for settlement not "made known" by filing in the land-office would not constitute a pre-emption claim.

In Kans. Pac. v. Dunmeyer, 113 U. S. 644, Mr. Justice Miller, construing the words of the exception under consideration here, said:

> "Of all the words in the English language, this word '*attached*' was probably the best that could have been used. It did not mean mere settlement, residence, or cultivation of the land, but it meant a proceeding in the proper land-office, by which the inchoate right to the land was initiated. It meant that by such a proceeding a right of homestead had fastened to that land."

This language was quoted and the decision reaffirmed, in **Hastings etc. v. Whitney, 132 U. S. 357**; and **Whitney v. Taylor, 158 U. S. 85.** See also **Gonzales v. French, 164 U. S. 338**; **Nor. Pac. v. Colburn, 164 U. S. 383**; and **Buxton v. Traver, 130 U. S. 232.**

In the early case of **Lansdale v. Daniels, 100 U. S. 116,** considering the necessity for and effect of the filing, it was held that

> "Such a notice of claim or declaratory statement is indispensably necessary to give the claimant any standing as a pre-emptor; the rule being that his settlement alone is not sufficient for that purpose."

In **Whitney v. Taylor, 158 U. S. 94,** after quoting with approval the matter herein quoted from Lansdale v. Daniels and Kans. Pac. v. Dunmeyer, the Court said:

> "And the acceptance of such declaratory statement, and noting the same on the books of the local land-office, is the official recognition of the pre-emption claim."

These cases clearly establish the rule that until a filing is made and accepted, there is neither pre-emption right nor "*pre-emption claim;*" and that until filing and acceptance of the declaratory statement, a "pre-emption claim" is not "attached." According to the authority of these cases the only claims of which cognizance can be taken, as excepting lands from the railroad grants considered, are claims *of record;* and this case illustrates the mischievous effect of a rule that would permit third parties, seeking to secure lands for themselves, to *change the record* by their own testimony. Such a rule would be a bid for false testimony, and lead to litigation and confusion of titles.

Definite location of the railroad on October 20th 1868 *identified* the lands granted and the lands excepted from the grant; and on that day legal title for this tract did or did not pass to the Central Pacific. If granted, it on that day became private property, not subject to pre-emption filing—hence

no "pre-emption claim" could thereafter attach to it.

As held in the cases cited, there could be neither pre-emption claim nor pre-emption right until filing was made—and here there was no filing on October 20th 1868. In other words, title to this land was vested on October 20th 1868, in either the Government or the Central Pacific—it was not in *suspense;* and if on that day it vested in the Central Pacific, the subsequent filing of Olney's declaratory statement could not, *ex post facto*, operate condemnation, forfeiture or defeasance of that title.

According to the theory of the Supreme Court of Utah, from October 20th 1868 (definite location) to May 29th 1869 (Olney's filing), the title to this land was *in nubibus*—vested in nobody—a derelict; suspended, like Mahomet's coffin. This theory arose out of the effect which the Court erroneously gave Section 2270 of the Revised Statutes, coupled with the gratuitous assumption that Olney *wanted* to file, *and would* have filed on or before October 20th 1868, but for that the land-office was not opened until April. When, on May 29th 1869, Olney filed, he *claimed* the benefit of settlement on April 23rd 1869, and asserted no claim to the land by reason of anything he had done back of that date. Prior to April 23rd his intentions may have been to pre-empt other land the was not obliged to

pre-empt this land), or to purchase this land from the Central Pacific (he alone could know when he first concluded to pre-empt); and in the absence of proof that he would have filed before the grant attached had the land-office been open, the natural and legal *presumption* is that he would not, in any event, have filed *prior to April 23rd 1869*—the date *claimed* in the filing, when made, for the initiation of his "pre-emption claim."

Section 2270 of the Revised Statutes provides, that

> "Whenever the vacancy of the office either of register or receiver, or of both, renders it impossible for the claimant to comply with any requisition of the pre-emption laws within the appointed time, such vacancy shall not operate to the *detriment of the party claiming*, in respect to any matter essential to the establishment of *his claim;* but such requisition must be complied with within the same period after the disability is removed as would have been allowed had such disability not existed."

This is a statute for the benefit of a pre-emptor seeking "the establishment of *his claim*," and to be relieved against "the detriment" that he might otherwise suffer because of vacancy in the land-office—it is not a statute for *third parties;* and *Olney* is not seeking, nor did he ever seek, "the establishment of his claim" otherwise than as he *did establish it*, by the declaratory statement filed. Olney filed his declaratory statement, and *rested.*

He never sought to establish any claim other than that "made known" by his filing—nor to be relieved from "detriment" suffered; but rested, satisfied with his filing.

It was successfully urged before the Supreme Court of Utah, that the Salt Lake Land-Office *ought* to have been opened prior to October 20th 1868; that Olney, being on the land, *ought* to have, and had the land-office been opened might have, filed before October 20th 1868; and as "Equity looks upon that as done which ought to have been done," therefore Olney's filing must be treated *as if* made prior to that date. The maxim has no application here—for obvious reasons.

Explaining this maxim, **Story's Eq. Jur. (13th Ed.), Sec. 64-g,** says:

> "The true meaning of this maxim is, that equity will treat the subject-matter as to collateral consequences and incidents, in the same manner as if the final acts *contemplated by the parties* had been executed exactly as they ought to have been, not as the parties might have executed them. But equity will not thus consider things in favor of all persons, *but only in favor of such as have a right to pray that the Acts might be done.*"

There is no evidence that the opening of the land-office at an earlier date than it opened, was "*contemplated by the parties:*" or that the parties, or any of them, "*contemplated*" that Olney would file prior to October 20th 1868; nor are "*the par-*

ties" to Olney's settlement or filing (Olney and the United States) before this Court; nor is this a case in which *equitable relief* could be extended.

> "What ought to be done is considered in equity as done; and its meaning is, that whenever the holder of property is *subject to an equity* in respect of it, the Court will, *as between the parties*, treat the subject-matter as if the equity had been worked and was impressed with the character which it would then have borne."
>
> **(Tiedman's Eq., Sec. 20.)**

Pom. Eq. Jur., Sec. 365 explains that it applies

> "To every instance where an *equitable ought* with respect to the subject-matter rests upon one towards another; to every kind of case where an affirmative equitable duty to do some positive act devolves upon one party, and a corresponding equitable right is held by another party."

But the Central Pacific did not take title to this land "subject to an equity" in favor of Olney. The Central Pacific was under no obligation to open the land-office—nor had it the power to open it; nor was it under obligation to file Olney's declaratory statement; nor did it induce him to waive the benefit (if any) of claiming settlement back of April 1869. No "*equitable ought*" rests on the Central Pacific towards Olney, or the defendant—they are, and have always been, *at arm's length*.

Provisions in the Act of 1864.

Section 4 of the Central Pacific's granting Act of 1864, after enlarging the extent of the grant made by the Act of 1862, provides that

> "Any lands granted by this Act, or the Act to which this is an amendment, shall not defeat or impair any *pre-emption*, homestead, swamp land, or other lawful *claim*."

Olney's *claim* was not defeated or impaired by the Central Pacific's grant. Seven months after the Central Pacific's grant attached Olney filed, claiming settlement initiated six months after that grant attached. The *claim* established by that filing, if lawful, was a claim of preference right to purchase the land.

The filing was *accepted*—it was not defeated by the grant. The grant had attached long before that filing, or the settlement claimed in it, were made. Olney asserted no other *claim*—he did not offer to purchase the land; nor is this a case in which the provisions of the Act of 1864 are invoked to preserve the claim of Olney, *as such*, against being defeated or impaired. This amendment, like section 2270 of the Revised Statutes, is for the benefit of pre-emptors—not for the benefit of third parties, like the defendant here.

Olney's *occupancy* prior to October 29th 1868 was not a "pre-emption claim"—hence, until he filed, he had no "pre-emption claim" to be defeat-

ed or impaired; nor did he, in any way, assert any claim for the land prior to April 23rd 1869—the date of settlement claimed.

Respectfully submitted,

L. R. Rogers,

Attorney for Plaintiff in Error.

Copy of Opinion for U.S. Court

Filed Jan. 18, 1900.

IN THE

Supreme Court of the United States

D. P. TARPEY,
Plaintiff in Error,

vs.

ANDREW MADSEN,
Defendant in Error.

119.

Error to the Supreme Court of Utah.

Additional Brief for Plaintiff in Error.

L. E. PAYSON,
Of Counsel for Plaintiff in Error.

In the Supreme Court of the United States.

OCTOBER TERM, 1899.

D. P. TARPEY,
Plaintiff in Error,
vs.
ANDREW MADSEN,
Defendant in Error.

} Error to the Supreme Court of Utah.

ADDITIONAL BRIEF OF PLAINTIFF IN ERROR.

STATEMENT OF CASE.

This was an ejectment brought by Tarpey against Madsen, February 11, 1898, to recover one hundred and sixty acres of land in Utah; part of an odd-numbered section, lying within the primary limits of the grant of public lands made to The Central Pacific Railroad Company by acts of Congress of July 1, 1862 (12 St., 489) and July 2, 1864 (13 St., 356).

The Railroad Company duly filed its assent to the Act of July 1, 1862.

The land in question, part of Section No. 29, T. 11, R. 2 W., in Box Elder County, Utah, was public land, of the kind and character contemplated by said grants, is within ten miles, on the north side of that portion of the Central Pacific Railroad, which extends from Monument Point to Ogden, the map of definite location of which was filed and duly approved by the Secretary of the Interior, on October 20, 1868.

Upon this line the road was constructed and duly accepted prior to A. D. 1870.

There was not, on or prior to October 20, 1868 (the date of the approval of the map of definite location), any filings or claims of any kind or character against this land of record in the United States Land Office.

On August 17, 1891, the Central Pacific Railroad executed and delivered to Tarpey, the plaintiff, its deed conveying to him the lands in controversy.

The cloud upon this title in the plaintiff grows out of this state of fact and decision in the Land Department.

The land was surveyed on September 12, 1856.

On November 4, 1884, the Central Pacific Railroad Company filed its selection list, embracing this land, at the local land office, and paid all costs of surveying and other charges by it to be paid. (Trans., p. 8.)

On May 29, 1869, one Moroni Olney filed the usual "declaratory statement" of his intention to claim this land as a pre-emption right, alleging that he "had on the 23d day of April, 1869, settled and improved" said land, &c. (Trans., p. 9.)

The land office at Salt Lake was not opened until May 9, 1869.

In December, 1892, Madsen made a contest in the local land office against the selection of this tract by the railroad company; a hearing was ordered by the General Land

Office on January 18, 1893, to "determine the status of the land on October 20, 1868, when the right of the company attached."

A hearing was had in the local land office in August, 1893, with this result, by the Register and Receiver:

"We find that the tract in question, the SW. of ¼ Section 29, Twp. 11 North, Range 2 West, of the Salt Lake meridian, *was settled upon, and occupied and claimed by a qualified entryman, to wit, Maroni Olney, prior to October 20, 1868, which therefore excepted the land from the operation of the grant of Congress to the Central Pacific Railroad Company.*" (Trans., p. 10.)

The italics are mine; the emphasis is made because this is the action which has so far defeated the Tarpey title, and which is the basis of the argument to be made here, *pro* and *con*, upon the principal error assigned, viz.: "3. The Court erred in holding and deciding that the mere residence, settlement and cultivation of the land in dispute by Moroni Olney prior to October 20, 1868, exempted the land and the title thereto from passing from the United States to said railroad company." (Trans., p. 19.)

The case here hinges entirely upon that finding by the local land officer, affirmed by the Commissioner of the General Land Office, and the holding by the courts below that such state of fact, mere settlement and occupation, excepted the land from the operation of the Act of Congress making the grant to the railroad company.

Resuming, the Commissioner of the General Land Office, on appeal, on May 24, 1895, affirmed the finding and holding of the local land office.

He held, as the land was in possession of one "who had a right to assert a claim to the same on October 20, 1868, it follows, under the established rulings of this Department, that this settlement was a segregation of the land inquestion, and

that it was thereby excepted from the operation of the grant to the Company," citing a number of cases from the "Land Decisions" in support of that view.

This was the decision referred to, in Trans., p. 10.

On June 20, 1896, Madsen made homestead entry of this land (Trans., p. 8), and on August 21, 1896, a patent on this entry was executed to him, which is his evidence of title in the suit.

The findings of the court below are full, and not necessary to be set out at length here. In substance they are, that, but for the possession by Olney, on October 20, 1868, which so segregated the tract that it was excepted from the grant (as the court held), the title of plaintiff as grantee of the railroad company was good.

The evidence of Groo, register of the local land office, carried into the findings of the court, is this:

"The records of the land office, now in my possession and produced here, show that on or before October 20, 1868, there was not any pre-emption, homestead, or other claim, or filing of any kind or character, or description whatsoever, upon or against this land in controversy." (Trans., p. 8.)

After the filing of his "declaratory statement" in May, 1869, nothing was done by Olney, his claim was abandoned, so far as appears.

It may be said that there is no dispute in this record over any question of fact.

The case was tried in the District Court without a jury; after the proofs were in showing the foregoing, with some other facts not deemed necessary now to notice, the court nonsuited the plaintiff, "upon the ground that the evidence shows the title to the land in controversy to be in the defendant, and that at the time of the beginning of this action the title to the land in controversy was in the United States of America." (Trans., p. 11.)

In the Supreme Court of Utah, to which an appeal was taken, the decision was again against the Tarpey title. (Trans., p. 13.)

The opinion of that court in substance was this:

The plaintiff claims title by virtue of a deed from the Central Pacific Railroad Company to him, and the grant to that company by the United States in the Acts of Congress of 1862 and 1864 reciting them.

The court calls attention to the exception in the third section of the Act of 1864, that the grant shall not defeat or impair any pre-emption, homestead or other lawful claim nor include the improvements of any "*bona fide*" settler.

The court finds regularity in proceedings by the railroad company, and that the map of definite location of line of railroad was duly filed and approved October 20, 1868, that the land was within the 20-mile limit, &c.

The court says (p. 13): "It was within the grant unless a pre-emption right had lawfully attached to it at the time the line of the road was definitely fixed, and the survey thereof had been filed in the office of the General Land Office."

So that in the Supreme Court of Utah precisely the same question was presented as is presented here on the third assignment of error. (Trans. p. 19.)

The court proceeds to recite what appears from the record, as to Olney's occupancy of the land in 1868, and of his filing his claim in May, 1869, and that the delay in filing was caused because the office was not open.

The court then recites the provisions of the pre-emption law (Sec. 2265, R. S.), that every claimant under the pre-emption law for land not yet proclaimed for sale is required to make known *his claim, in writing*, to the register of the proper land office within three months from the time of settlement, *giving* the *designation of the tract and the time of settlement.*

The opinion then concludes the matter (p. 15):

> "It appears from the record that Olney filed his declaratory statement with the Register in less than a month after the office of Register was filled. *Having settled upon the land in question before the railroad company established its line of definite location* and filed its survey or map thereof in the General Land Office, *and having filed his declaratory statement with the Register of the land office of the district within the time allowed by law*, we must hold that *Olney's pre-emption claim had attached* to the land in question, *and existed thereon before the right of the Central Pacific railroad became fixed*, and that the land in dispute did not pass by the grant relied on."

Further on page 16 the Court said:

> "When Olney, the pre-emptioner in this case, filed his declaratory statement, his right must be deemed in law to relate to the *date of his settlement* on the land in dispute. Therefore, he had a *lawful claim* upon it when the grant to the railroad took effect, and the land in dispute was not included in it. The grant of land to the Central Pacific Railroad Company took effect when the line of definite location of its road was made, and the survey filed in the General Land Office, but it did not include the land in dispute, because it was at that time subject to the lawful right of Olney, a pre-emptor.
>
> But when he failed to comply with the requisites imposed in order to obtain title, the land became again a part of the public lands of the United States, and was subject to the homestead entry of defendant Andrew Madsen, or to any other entry or pre-emption."

So the Court held that the patent to Madsen passed the title to him, and affirmed the judgment.

These somewhat extended quotations and statements from the record are made so that the Court may have concisely

before it the undisputed facts, viz, that the map of the definite location of the Central Pacific Railroad was duly filed and approved October 20, 1868; that at that date there was no pre-emption, homestead or other claim or filing of any kind, character or description against this land; that it was, so far as the Land Office records showed, free and clear public land in an odd-numbered section; that although Olney was in possession of the land on that date, he took no steps in the Land Office in any way until he filed the usual "declaratory statement" in pre-emption on May 29, 1869, in which paper he alleged that his settlement began on April 23, 1869, almost six months after the approval of the map of "definite location."

That this mere residence and occupation, *as a fact*, on October 20, 1868, by Olney, exempted the land from the grant, as a matter of law, has been the holding of both courts below, thus affirming the title in Madsen because of his homestead entry, initiated June 20, 1896, followed by patent thereon August 21, 1896.

Madsen is in no way connected with Olney; he is a stranger to any proceeding by the latter; but he claims the right to show that although Olney only claimed, for the purpose of his, Olney's, pre-emption, that the settlement therefor was made on April 23, 1869, that Olney was mistaken in this, or, rather, that Olney in fact settled before or on October 20, 1868, and that such occupancy should be held to enure to the pre-emption claim, although not claimed therefor by Olney, excepting thus the land from the grant; so that he, Madsen, causing such proof to be made, could homestead the land nearly eight years afterwards.

ARGUMENT.

The status of the land at the time of the definite location of the road constitutes the criterion by which the lands to which the company is entitled are to be determined.

Until there is a filing or entry in the United States Land Office, no pre-emption or pre-emption claim had attached, and there was neither filing nor entry on October 20, 1868, when the line of the Central Pacific Railroad was definitely fixed.

In this argument it will be assumed that no citation of authorties is necessary upon these points:

1. That in a railroad land grant, acceptance of the act by the railroad company, followed by definite location of line, vests the title in the company of all public lands within the terms of the grant as of the date of the grant.

2. As the line of road in this case was "definitely fixed" on October 20, 1868, then all such public lands as were not sold, reserved, or otherwise disposed of by the United States, and to which a pre-emption or homestead claim may not have attached at that date, became, on that date, the property of the railroad company, as of the date of the Act of Congress making the grant, and the deed of the company to plaintiff gave him a *prima facie* right of recovery below.

3. The determination by the land officers of the United States, that "the land in question was settled upon, occupied and claimed by a qualified entryman prior to October 20, 1868," is only the ascertainment of a question of *fact*, and their conclusion that such fact would except the land from the grant was a decision on a matter of law which did not conclude the parties, and left the question open to review in the courts.

4. Under the Pacific Railroad acts of 1862 and 1864, no

pre-emption claim can be held to have attached to lands under the exceptions in the acts by mere settlement, residence or cultivation ; there must be a proceeding in the proper land office by which the pre-emption right is initiated, and until there is a filing or entry in the United States Land Office, there is no pre-emption or claim, or pre-emption claim "attached."

5. If a lawful, valid pre-emption claim under the law had not attached to this land on October 20, 1868, the subsequent ruling of the land officers that, as a matter of law, such a claim had attached, and such ruling resulted in a patent to defendant, the validity of such patent may be questioned and determined in this suit.

None of these questions are now open.

Upon this record and the assignment of errors therein, it only remains to discuss the effect of the filing by Olney of his declaratory statement in May, 1869, alleging settlement in April, 1869, coupled with the fact of occupancy in October, 1868, as against the railroad title in Tarpey found by the court below to be good, except for this claim by Olney.

There is no dispute as to fact in this case. It was not denied below, it will not be denied here, that the courts below both found that the land in dispute was within the limits of the Central Pacific grant ; that the records of the Land Office showed that on October 20, 1868 (the date of due definite location of line) there were no claims or filings of any kind upon or against this land; that so far as the records showed it was clear public land on that date, and therefore the title passed to the railroad company, unless, as was said by the court below, "it was within the grant, unless a pre-emption right had lawfully attached to it," on this date, by the fact of *occupancy* by Olney, together with his "declaratory statement," as a proposed pre-emptor made

May 29, 1869, *alleging* settlement April 23, 1869. It will be remembered in this connection that this was the beginning and ending of Olney with this land. After the filing of the declaratory statement he disappears and his claim was abandoned.

More than twenty-three years afterwards, in 1892, Madsen makes a contest against the railroad company, not because of any relation between himself and Olney, but, invoking the rule that a lawful pre-emption right attaching to land within a railroad grant, at definite location, excepts the land from the grant, and leaves it open for the first qualified applicant, he, to secure the land sets up and proves Olney's relation to the land, as stated, and secures the patent, because of the Department rulings cited above.

The adoption of these rulings by the courts below gave Madsen the judgment appealed from.

In the adjustment of the various land grants to railroad companies made by Congress, in the Department of the Interior, the question as to the effect of occupancy alone, before definite location, upon lands within the limits of the grant was presented very early.

Until the decision of *The N. P. R. R. Co.vs. Colburn, 164 U. S., 383*, the excepting clause in the several grants was uniformly construed to include all lands in the actual occupancy of a person at definite location of line of railroad who had the qualifications to make entry under the public land laws not only without proof of any subsequent filing or entry, based upon such occupancy, but without proof of the intention of the party in possession to make any formal claim to the land.

The *Colburn* case is entirely decisive of this it is submitted ; but the factor appearing in the case that Olney did make a formal beginning of proceedings for this land, although subsequent to definite location by the railroad

company, so that a formal filing did appear of record, although six months too late, which will doubtless be urged by appellee here, seems to require notice.

On this state of case three questions are presented on the third assigned error, which error really covers the whole case. For convenience it is repeated here.

"3. The court erred in holding and deciding that the mere residence, settlement and cultivation of the land in dispute by Moroni Olney, prior to October 20, 1868, exempted the land and the title thereto from passing from the United States to said railroad company." (Trans., p. 19.)

The questions may be thus stated :

1. Was not the claim made by Olney, in his declaratory statement as to residence, so long as he permitted it to stand, conclusive, especially as to third parties; in other words, can third parties be permitted to set up a different claim than that made by the proposed entryman to enure to their benefit?

2. As in Olney's declaratory statement, he only claimed that he made settlement on April 23, 1869, and as he abandoned the proceeding after that filing, was it proper, in the contest initiated in the land office in 1892, by Madsen, to hold that by proof of the fact of occupancy by Olney in October, 1868, Olney's pre-emption claim "attached" to this land at that date?

3. If the land was within the grant, as found by the court below (Trans., p. 13), unless a pre-emption right had lawfully attached to it on October 20, 1868, could such right attach, under a declaratory statement made and filed in the local office in May, 1869, alleging settlement in April, 1869?

Occupancy, with qualification of the entry man, was held uniformly by the Interior Department to be the initiation

of a pre-emption claim, and that by such occupancy a pre-emption claim attached to the land.

Scores of such decisions have been made and the railroad claim rejected.

To such a refinement did this course of decision progress that it was held in a class of cases in the Land Office, that the mere going upon a tract of land year by year to cut wild hay, living in a covered wagon upon it during the haying season, but having a house and home in a not remote village, was such an occupancy as to except the land from the grant under consideration.

Many of the subordinate courts of the country have had cases before them involving this question of whether by occupancy alone a pre-emption claim could attach to public land; generally, as in this case in the courts below, the ruling of the Interior Department was followed. This line of decision in the Department of the Interior was not interrupted until the decision of this court in *The Northern Pacific Railroad Co. vs. Colburn*, where, for the first time, the question was so clearly presented and decided that no strained construction was possible.

In that case (p. 386), this Court said decisively, "no pre-emption or homestead claim attaches to a tract, until an entry in the local land office."

Notwithstanding the clear opinions in *The K. P. R. Co. vs. Dunmeyer, 113 U. S., 629; Hastings & D. R. Co. vs. Whitney, 132 U. S., 357; Whitney vs. Taylor, 158 U. S., 85; Lansdale vs. Daniels, 100 U. S., 113, and Maddox vs. Burnham, 156 U. S., 544*, the Department of the Interior continued to hold that by mere occupation, with qualification to enter, on the part of the entryman, at definite location of railroad line, a pre-emption claim "attached" to public land, so as to except it from the railroad grant, until the decision in the Colburn case.

The Court will recall the earnest effort made by the Secretary of the Interior and the Attorney-General of the United States to secure a reversal, on a re-argument and re-submission, of the *Colburn* case on brief prepared in the Department and endorsed by the Solicitor-General.

The effort failed ; the Court stood by its decision and the reasoning therefor, so that the law is well and clearly settled for like cases. The *Colburn* case is now being followed by the Department.

What then is the case here?

The Court below found (Trans., p. 13), as to the land, "It was within the grant unless a pre-emption right had lawfully attached to it at the time the line of the road was definitely fixed, and the survey thereof had been filed in the office of the General Land Office," October 20, 1868.

Sustaining this, is the fact found by the trial court (Trans., p. 8), that the land office records showed that on that date there were no claims or filings of any kind whatsoever, against this land.

This of course made a clear case for plaintiff.

To meet it, defendant was permitted to prove the "declaratory statement" of Olney, of May 29, 1869, alleging settlement with a view to pre-emption purchase, on April 23, 1869.

Obviously, this was clearly insufficient to prejudice plaintiff's title, because it was subsequent to the vesting of title under the grant, in the railroad company by definite location October 20, the previous year.

So defendant to meet that dilemma, is permitted to make proof that, in a contest against the railroad selection, in the local land office in 1893, it was found that the land was occupied and settled upon "by a qualified entryman, Maroni Olney, prior to October 20, 1868, *which therefore excepted the land from the operation of the grant* of Congress to the Central Pacific Railroad Company."

The italics are mine, and as stated above, in the statement of the case here, the emphasis is made, because this finding of the fact of mere occupancy (without any written notice of claim or intention to claim, or any "declaratory statement" filed in the local land office ever making such occupancy the basis of a proceeding to secure the land under the pre-emption law), and the conclusion as to the effect of such occupancy, is the action which has thus far defeated the plaintiff's title, as similar findings and conclusions have defeated railroad title in hundreds of cases in the Department before the decision of the *Colburn* case.

Now, in this case, as in Colburn's, there was occupancy, with qualification, and that alone at definite location of railroad line. In each case the land was free and clear of any record claim or notice of claim when the grant became effective by definite location.

The only difference in the cases is, that Kelly, the occupant in Colburn's case, made no filing, while here Olney, the occupant, did make a filing; but made, however, in his claim, such a case as was utterly valueless, even for himself much less for a stranger, as is Madsen.

So the three questions suggested on page 11 *supra*, possibly should be discussed.

1. Was not the claim made by Olney in his declaratory statement as to residence so long as he permitted it to stand, conclusive, and especially as to third parties; in other words, can third parties be permitted to set up a different claim than that made by the proposed entryman to enure to their benefit.

The statute, Section 2265 (cited Trans., p. 14), provides that every claimant under the pre-emption law for land not yet proclaimed for sale is "required to make known his claim in writing to the register of the proper land office within three months from the time of settlement, giving the designation of the tract and the time of settlement," etc.

Section 2270 provides for a condition where, by vacancy in office, the claimant cannot comply with all the requisites of the law within the appointed time, he may have the same period after the disability is removed.

This of course relates to the times of filing of necessary papers, and action between the proposed entryman and the local land officers.

This section is clearly for the benefit of a pre-emptor who is seeking to sustain his own filing, against delay in presenting it; but the requisites of the "declaratory statement" are not changed; he must make known his claim in writing, giving the time of his settlement, just the same no matter when the actual filing shall be made.

This is for obvious reasons. It is a matter of common knowledge that temporary occupancy of public lands for grazing, cutting hay, farming, hunting, etc., etc., commonly called "squatting," is as old as the public land system. Such occupancy no matter how long continued never gave any right to the land.

Whenever the occupant determined to avail himself of the privilege of the public land law, and assume the burden of payment under the pre-emption law, or of continued improvement and cultivation under the homestead law, that condition of mind and intention must be shown upon paper and made a matter of record, by a declaratory statement in pre-emption, and actual entry in homestead cases.

He may have been in possession for years without intention of becoming a purchaser; he was only a "squatter," he had no more rights to the land at the end than at the beginning; but as soon as he becomes a claimant for the land under the pre-emption law, the statute requires that he "put in writing *his claim*," and "*the time of settlement*," for the purposes of that claim. It is a necessary statement, because "required" by the Statute; it is made upon knowl-

edge, because the claimant knows when he determined that occupancy should be the basis of the pre-emption claim; it is conclusive, so long as it stands, because it is the record of of his claim, made by him, and so long as it is unchanged of record his claim stands or falls by it.

This, it is submitted, is perfectly clear and certain as to him, and therefore as to third parties.

In this case, Olney, in 1869, puts upon record his "claim" under the public land laws; in it *he* avers that his settlement for the purpose of the claim was made on April 23d of the same year.

No matter if he had been in possession in fact longer, he formally declares to the land officers in his statement of his "claim" that his settlement for that purpose began on April 23, 1869, and in his formal statement he asserted no claim to this land by reason of anything he had done prior to that date.

But Madsen, hoping to secure the land, in 1892 brings proof that, in fact, Olney was on the land in 1868. Granted; but what of it? Presumably as a squatter, because *he*, who knew, made no claim otherwise, although it was to his interest to make claim of earlier occupancy with intention to purchase, if such were the fact. When called upon to put his case on paper he solemnly averred that the date of his "settlement" was April 23, 1869.

This is the "claim made known in writing to the register" under the statute. He asserted no claim to the land by reason of anything he had done prior to that date; and until the filing of that declaratory statement in the proper land office there was no "pre-emption claim" to attach to this land. The pre-emption claim which did attach, if any, was the one the claimant Olney chose to make for himself.

It was held in the Department, that as Olney *was* occupying the land on October 20, 1868, he *might* have claimed

settlement on that day. Granted; but it is the claim which he *did* file, not one which, *possibly*, he might have filed, that is to be considered here. He *might* have been occupying more than 160 acres of land; he *might* have designated other land; the fact of what he *did do*, and what he *did claim*, is the only proper basis of consideration here.

Olney, with full knowledge, made his claim as best suited him; he was content with it; he, undoubtedly, soon learned that, as against the action of the railroad company in definitely locating, on October 20 of the previous year, his claim was valueless; because it was never pressed. It ended with the making; was, in fact, abandoned by Olney.

In this record, Olney's claim stands as he made it; there is no pretense of evidence or finding that it was not true. Therefore it is conclusive upon all claiming directly or indirectly under it.

Especially should this be so as to Madsen. Not until 1892, twenty-four years after the railroad title attached; more than a year after Tarpey bought and took title under the railroad company, did Madsen begin a contest, in order to permit him to enter the land if successful.

He resurrected proof of the fact of prior occupancy, and invoking the ruling of the Department upon such fact, now thoroughly exploded by the decision of this court in the *Colburn* case, has succeeded in getting favorable decisions upon his unconscionable claim.

How can he be heard to insist that Olney did not know just what he had a right to claim; or that he, Madsen, should be benefitted, by overturning our title, because it may be *guessed* that if Olney had made a different claim, he might have succeeded.

No, your Honors, this case must be tried as to that question, upon what Olney *did* claim, with which "claim" he was content, and upon which he rested, and which claim, instead of amending, or trying to perfect, he abandoned.

If this be so, Olney's settlement as to the pre-emption claim rests upon the record he made, as of April 23, 1869.

Now, the status of the land at the time of the definite location of the road constitutes the criterion by which the lands to which the company is entitled are to be determined.

Van Wyck *vs.* Knevals, 106 U. S., 360.
K. P. Ry. Co. *vs* Dunmeyer, 113 U. S., 629.

By any deduction from the undisputed evidence in this record on October 20, 1868, when the Central Pacific grant took effect as to this part of its line, Olney was a mere "squatter," nothing more; he was in possession; only that.

There is nothing in the record tending to show that Olney ever made claim inconsistent with the charge here that on October 20, 1868, he was merely a "squatter." The only claim ever made by him was in his declaratory statement in May, 1869, that he made settlement under the public land laws in April, 1869.

2d. The second question, viz, "As in Olney's declaratory statement, he only claimed that he made settlement on April 23, 1869; and as he abandoned the proceeding, after that filing, was it proper in the contest initiated in the land office in 1892 by Madsen to hold, that by proof of the fact of occupancy by Olney in October, 1868, Olney's pre-emption claim had attached to this land at that date?" it seems, is easily answered, in view of the recent decisions of this Court.

Such holding was made by the Department, because of the previous rulings referred to and tenaciously adhered to, that mere occupancy, with qualification to enter, by the occupant, excepted the land from the grant, because (as was held) by such occupation the pre-emption right "*attached.*"

But in the *Colburn* case it is said, "But frequent decisions of this Court have been to the effect that no pre-emption or

homestead claim attaches to a tract until an entry in the local land office."

The decision of the Register and Receiver made in 1893 (and affirmed by the Commissioner of the General Land Office), as follows: "We find that the tract in question * * * was settled upon and occupied and claimed by a qualified entryman, to wit, Moroni Olney, prior to October 20, 1868, which therefore excepted the land from the operation of the grant to the Central Pacific Railroad Company," was clearly erroneous as a matter of law, and this Court must review it and decide the question for itself.

Therefore the proof was improper and irrelevant, to any question of right, under the filing by Olney; its only effect would be to determine the *fact* of occupancy which would conclude the parties probably, if such fact were ever of importance. The legal deduction, however, was and is open to review, and has been, as shown, overruled by this Court.

N. P. R. R. Co. *vs.* Colburn, *supra.*

That a pre-emption has "attached" cannot be shown by parol proof of occupation and qualification of the occupant, is now settled law, and the proof was improper, not only in the Land Office but in the court below.

The third question also is easily answered, as the argument on the first really concludes this.

It may, however, be added that on October 20, 1868, the definite location of the railroad line identified the lands granted, and on that day the legal title for this tract did or did not pass to the Central Pacific Railroad Company. The status of the land, as it appeared of record, would determine this.

Both courts below have found that this tract was clear of all claims of record and of the character that would pass by the grant.

If the tract was granted; if the grant became effective on that day, no pre-emption claim could thereafter attach to it, and no subsequent action by Olney, based on alleged acts by him for that purpose, subsequent to October 20, 1868, could in any way affect the land so granted and the title so vested.

In the light then of the opinion in the *Colburn* case the language of Mr. Justice Miller in the case of *The K. P. R. Co. vs. Dunmeyer* may be emphasized, remembering that the same land grant is involved in this case as in that.

> "Of all the words in the English language this word '*attached*' was probably the best that could have been used. It did not mean mere settlement, residence or cultivation of the land, but it meant a proceeding in the proper land office by which the inchoate right was initiated. It meant that by such a proceeding a right of homestead had fastened to that land."

In *Lansdale vs. Daniels, 100 U. S., 113*, quoted approvingly in the *Colburn case, 164 U. S., 385*, it is said: "Such a notice of claim or declaratory statement is indispensably necessary to give the claimant any standing as a pre-emptor, the rule being that settlement alone is not sufficient for that purpose."

Therefore conclusively on October 20, 1868, Olney was a mere "squatter" nor could have any standing as a pre-emptor.

Possibly it may be urged that as the local land office was not opened until March 9, 1869, that Sec. 2270 R. S. cited above will aid or excuse Olney for not making an earlier filing.

What has been said above (p. 15) as to this with the suggestion, on pp. 17 and 18 of the brief of my associate, Mr. Rogers, already on file, covers this point if made. In no way can this section relieve the difficulty that in his declaratory statement Olney makes a case as to date of settlement subsequent to the date of the railroad title, and hence valueless.

It has been very unfortunate that the Secretary of the Interior at so early a day made the erroneous rulings which were finally corrected by this Court by its decision in the Colburn case; equally so, that many inferior courts adopted those rulings as judicial constructions of the excepting clause of this and similar grants.

Such decisions worked the errors complained of in this case. (Trans., p. 19.)

No technical questions of proofs or lack of proof can be raised here on this record; no cross errors are assigned.

The courts below both found that this land was "granted land" to the Central Pacific Railroad Co., unless the facts found as to Olney's occupation and attempted pre-emption (as to which there is no dispute) were such that in law, a lawful pre-emption claim by Olney had attached to this land on October 20, 1868.

To reach that conclusion the Court was compelled to hold and did hold and decide that the mere residence, settlement and cultivation of the land by Olney prior to October 20, 1868, excepted the land from the grant, and prevented the title thereto from passing from the United States to said railroad company.

This was clearly error; it was upon the controlling question in the case, and for that error, the judgment below should be reversed.

Respectfully submitted,

L. E. PAYSON,

Of Counsel for Appellant.

Since the foregoing was printed, the brief of defendant in error has been filed ; for convenience a brief review of it is appended here.

The statement of defendant on page 3 of that brief, that, " The claim of the plaintiff in error is in effect that the land passed to the company for the reason, that on October 20, 1868, the alleged date of definite location, there was no filing of public record," is not quite accurate.

We further insist that the claim which Olney *did* make, in writing, for the purpose of advising the Land Department of just what he did claim, viz ; that he made settlement on this land, for the purpose of pre-emption entry, on April 23, 1869, is the only one which can be considered as against plaintiff. This claim Olney has permitted to stand ; it has never been changed ; it has never been proven to be untrue, and our further claim is, that so long as Olney permits it to stand, a third party, a stranger to Olney, as Madsen is, cannot set up, upon inference, a different claim than Olney himself made.

It is no answer to say that the statute then in force as to withdrawn lands in railroad limits ; no declaratory statement was necessary referring to the act of March 27, 1854. It may be remarked that it is quite clear that it was not the intent of Congress to dispense with declaratory statements, in preemption cases under that act, because Congress, upon knowledge that the Secretary of the Interior was so construing the act, promptly passed the act of July 14, 1870 (16 Stat., 279, Sec. 2), that nothing in the act of 1854 should be construed as to relieve settlers from the obligation to file the usual declaratory statements.

Whether that be so or not, whatever Olney's claim was,

it was pending when this later act was passed, and had he applied to enter the land, a declaratory statement would have been necessary. As he abandoned the proceeding upon its beginning (for it never progressed after May 29, 1869), and as *he* saw fit to reduce his claim to writing and file it at the local land office, even if he were not compelled to do so by existing regulations, still he did so; has stood by it, never changed it; for aught appearing, it stated the true fact, with which he has been content, and therefore, Madsen, a stranger, 23 years afterwards, cannot be heard to set up, as a *fact*, a different state of case to secure this land, the title to which, if the statements in Olney's paper are to be taken as true, is, unquestionably, under this record, in the plaintiff in error.

We are content with the suggestions in our additional brief on page 11 *et seq.* on this point, when it is kept in mind that Madsen is only to be allowed to take advantage of the situation that Olney created, and as Olney left it.

Madsen is not in interest with Olney. He cannot amend Olney's papers, and, as one succeeding in a meritorious way, make a new amended case for Olney; not at all.

If the record as to this land, as it stood and stands, did not give Olney the right to it on October 20, 1868 then Madsen, fails.

Again, we need only repeat, as to the point made on page 8 of defendant's brief, "that plaintiff did not negative the exceptions in the grant to the railroad company;" no technical questions of proofs, or lack of proof, as to plaintiff's title can be raised on this record.

Both Courts below found that this land was "granted land to the Central Pacific Railroad Co.," unless the facts found as to Olney's possession and attempted pre-emption (as to which there is no dispute) were such that a "lawful

pre-emption claim" by Olney "had attached to this land on October 20, 1868."

On the record, as made, the 3d assigned error is presented for discussion and decision here, viz, that the Court erred in holding and deciding that the mere residence, settlement, and cultivation of the land in dispute by Moron Olney prior to October 20, 1868, excepted the land and the title thereto from passing from the United States to the railroad company. (Trans., p. 19.)

That was the question below; it was decided against plaintiff. The Court below held "the land was within the grant, unlesss a pre-emption right had lawfully attached to it," and that the facts recited constitute a valid pre-emption claim.

No cross-error is assigned, and so the precise question, under the 3d assigned error, is presented here.

Remarking, that the only additional point, that on page 10 of defendant's brief, viz, that "the Department allowed a declaratory statement to be filed on this land in 1869, thereby deciding that it was not railroad land," is hardly worthy of serious notice. Our additional brief contains all that we desire to submit upon the third assigned error.

Respectfully submitted.

L. E. PAYSON,
Of Counsel for Plaintiff in Error.

No. 119.

FEB 5 1900
JAMES H. McKENNEY,

Supp. Brf. of Payson for D.E.

119.

In the Supreme Court of the United States.

Filed Feb. 5, 1900.

D. P. TARPEY,
Plaintiff in Error,
vs.
ANDREW MADSEN,
Defendant in Error.

Error to the Supreme Court of Utah.

Supplemental Brief for Plaintiff in Error

By Leave of Court.

L. E. PAYSON,
Of Counsel for Plaintiff in Error.

In the Supreme Court of the United States.

OCTOBER TERM, 1899.

D. P. TARPEY,
Plaintiff in Error,
vs.
ANDREW MADSEN,
Defendant in Error.

Error to the Supreme Court of Utah.

Supplemental Brief of Plaintiff in Error.

Upon the oral argument of the case, Mr. Justice Harlan made this enquiry: The defendant having a patent to the land involved, can its validity be questioned by a suit in ejectment; must not resort be had to equity, to hold defendant as trustee?

As that point had not been presented below, nor in brief for defendant here, no reference was made in the briefs for plaintiff in error; so by leave of Court, this supplemental brief is filed.

Under a railroad land grant, title attaches, as of the date of the grant, upon definite location of line; no patent to the railroad company is necessary, and ejectment will lie, by the grantee of the railroad title.

Deseret Salt Co. *vs.* Tarpey, 142 U. S. 241.

The railroad title is equivalent to, and as complete, upon approval of the map of definite location, by the Secretary

of the Interior, as a "patent" title—and the officers of the Land Department are fully advised by these records of this situation, that the land is "disposed of" by the grant.

Wright *vs.* Roseberry, 121 U. S., 428, was an ejectment. The plaintiff claimed, as grantee under the State, the title to the premises as "swamp and overflowed land," under the Act of Congress of September 28, 1850, 9 Stat., 519; the defendant, under a patent in a pre-emption proceeding under the public land laws.

It was decided that the Swamp-Land Act of September 20, 1850, operated as a grant *in præsente* to the State of all swamp land within it, passing the title as of its date, requiring only identification to render the title perfect.

(Precisely as under a railroad land grant.)

The case was remanded for a new trial "when the parties will be at liberty to show whether or not the lands in controversy were *in fact* swamp and overflowed on the day that the swamp-land act of 1850 took effect. If they are proved to have been such lands at that date they were not afterwards subject to pre-emption by settlers. They were not afterwards public lands at the disposal of the United States."

Exactly a parallel case with this as to relation of parties toward the subject-matter.

Upon the enquiry in hand, viz, the right of a plaintiff, under a Congressional grant, to question a patent to defendant, issued under the general land laws in ejectment, the subject is fully discussed in the opinion and definitely settled.

The Court say:

"It would be a most extraordinary doctrine if the holder of a conveyance of land from a State were precluded from establishing his title simply because the United States may have subsequently conveyed the land to another, and especially from showing that years before they had granted

the property to the State, and thus were without title at the time of their subsequent conveyance." "A grant has been frequently issued by the United States for land which had been previously granted and the second grant has been held inoperative."

So in *Burfenning vs. C. St. P., &c., Ry. Co. 163, U. S. 321.* Where, in an ejectment, plaintiff relied upon a patent in a homestead proceeding, the patent was defeated.

The Court say:

"But it is also equally true that when by Act of Congress a tract of land has been reserved from homestead and pre-emption, or dedicated to any special purpose, proceedings in the Land Department in defiance of such reservation or dedication, although culminating in a patent, transfer no title, and may be challenged in an action at law."

So in *Morton vs. Nebraska, 21 Wal. 660,* on p. 674:

"It has been repeatedly decided by this court that patents for lands which have been previously granted, reserved from sale or appropriated are void. The executive officers had no authority to issue a patent for the lands in controversy, because they were not subject to entry, having been previously reserved, and this want of power may be proved by a defendant in an action at law."

See also the reasoning in *Colburn vs. N. P. R. R. Co.,* 164 U. S. 388.

Upon another enquiry made from the Bench, as to the line of authorities, relating to a "declaratory statement" and its qualities and effects, this is submitted:

1. This land was "unoffered land," or land "not yet proclaimed for sale."

The statute (sec. 2265, R. S.) is, "Every claimant under the pre-emption law for land not yet proclaimed for sale is *required* to *make known his claim in writing* to the register of the proper land office within three months of the time of

the settlement, *giving the designation of the tract* and *the time of settlement,*" etc.

(The italics are mine.)

The claimant is *required* to set up, or make known *his* claim under the pre-emption law; in writing within the specified time of *the* settlement under which he claims, and *describe the land* and the *time of settlement.*

These are all fundamental conditions; he is under precisely the same requirement to state the *time* of his settlement, as to *describe* the land; precisely; neither is of less importance than the other.

I quote from *Whitney vs. Taylor, 158 U. S. 85,* as to pre-emption claims:

"Settlement is the initial fact." "In this respect a pre-emption d ffers from a homestead, for the entry in the land office is in respect to the latter, the initial fact." "But it is also true that settlement alone, without a declaratory statement, creates no pre-emption right.

Such a notice of claim, or declaratory statement, is indispensably necessary to give the claimant any standing as a pre-emptor, the rule being that his settlement alone is not sufficient for that purpose."

"And the filing of this declaratory statement was, in the strictest sense of the term, the assertion of a pre-emption claim, and when filed and noted it was officially recognized as such." (Page 94.)

"Indeed this declaratory statement bears substantially the same relation to a purchase under the pre-emption law that the original entry in a homestead case does to the final acquisition of title." "It is true one must be verified, the other need not be." (Page 95.)

"At any rate Congress has seen fit not to require an affidavit to a declaratory statement, and has provided for the filing of such unsworn statement as the proper means for an assertion on record of a claim under the pre-emption law, and that is all that is necessary to except the land from the scope of the grant." (Page 96.)

All this shows that compliance with the requirements of the statute is substantial, and *only* when the declaratory statement shows on its face as against the status of the land a right to the pre-emptor to claim it can it except the land from the grant, by the record thus made.

So long then as Olney permitted the statement to stand as to the time when he determined to avail himself of the privilege and assume the burden of payment under the statute, that averment must control *him* and *he* has never, so far as this record discloses, disaffirmed the *claim made in writing*, as to *the* settlement, that it was April 23, 1869.

The *claim* was solemnly and considerately made by Olney. It will be remembered that counsel for defendant, on the oral argument, deliberately stated when Olney's declaratory statement was presented for filing the local land officers had an *ex parte* hearing as to the right of Olney so to do, and the filing was the result of that hearing, so that the presumed deliberation of Olney in the preparation and filing of the paper is emphasized.

The finding of fact by the local land officers, in August, 1893, on Madsen's application to enter, made more than 24 years after Olney's action, and necessarily based on hearsay given by neighbors, certainly cannot overturn the formal written statement of Olney, made for the purpose of making his pre-emption claim and signed necessarily after the hearsay matters testified to by neighbors.

It was improper for the local land officers to take testimony as to Olney's claim, in his absence, against his written claim which then and still makes the "record" of this pre-emption claim. While the finding of the land officers, *in a proper case*, is conclusive, whenever the fact is essential, it cannot be so in this case, because Olney was not a party and was not heard; because Olney's case was in writing, formally made and with it he was and is content.

Madsen is a stranger, not claiming through or under Olney, but because of Olney's case, whatever *it* was; that case Olney deliberately made and stood by. Confessedly as made by *him*, it did not affect the Central Pacific grant as to this land because that attached October 20, 1868.

Madsen did not begin his attempt to secure this land until 1892, twenty-four years and five months after the definite location of railroad line, and attaching of railroad title; twenty-three years and seven months after Olney made and abandoned his filing; eight years and one month after the Central Pacific Railroad Company selected the land; and one year and five months after Tarpey received his deed.

Can the title to this land be left to rest, *in parol*, during all these years—almost a generation—to be resurrected and made to depend upon recollection of witnesses as to what Olney said and did, before he made his formal statement as to his real intentions?

The statute required him to make the statement; he did so, and is content with it; so long as it stands unrevoked and unchanged by him, his case stands or falls with it.

Upon the point made, that the record does not show that the land in suit was not proved not to be within all the exceptions named in the statute, I submit that the proofs do so show, when the whole record is read.

Moreover, Madsen claims the land under the homestead laws, and his patent was issued on his homestead entry. Now, any land subject to homestead entry is subject to railroad grant, and Madsen cannot question it.

Respectfully submitted,

L. E. PAYSON,

Of Counsel for Plaintiff in Error.

No. 179

Brief of Jones for D. E.

Filed Sept 26, 1899

SUPREME COURT OF THE UNITED STATES

FILED

SEP 26 1899

JAMES H. MCKENNEY,
Clerk

E. P. TARPEY, PLAINTIFF IN ERROR,

vs.

ANDREW MADDEN, DEFENDANT IN ERROR.

BRIEF OF DEFENDANT IN ERROR.

R. H. JONES,
Attorney for Defendant in Error.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

D. P. TARPEY, PLAINTIFF IN ERROR,

vs.

ANDREW MADSEN, DEFENDANT IN ERROR.

BRIEF OF DEFENDANT IN ERROR.

The action is one of ejectment brought by plaintiff in error as grantee of the Central Pacific Railway Company against Andrew Madson the patentee of the United States. A non suit was granted in trial court from which plaintiff in error appeals. The record shows that prior to the 20th day of October, 1868, the alleged date of the definate location of the railroad, the land in question was settled upon and occupied and claimed by a qualified entryman, Moroni Olney (T. of R. 9). The land was not surveyed and a plat filed in the United States Land Office until 1869 (T. of R. 7). The Land Office was not opened until April or May, 1869 (T. of R., 8). On the 29th day of May, 1869, Moroni

Olney, in pursuance of a settlement made prior to October 20, 1868, filed a pre-emption declaratory statement covering the land in dispute. It is true this pre-emption declaratory statement alleged settlement on the 23rd day of April, 1869, but that is immaterial for the reason that the officers of the land department are presumed to have done their duty and before they permtted this filing and before they accepted Moroni Olney's money a hearing must have been had in which it was shown that the settlement was made prior to the definite location of the road and in which it was shown that this land was excepted from the grant. A finding to this effect must have been made before the pre-emption declaratory statement was accepted and made a matter of public record. The acceptance of this D. S. was a judicial act. It will be presumed that the officers acted on sufficient evidence. The railroad company did not appeal. (Burnham vs. Starkey, 21 Pac., 629.) The settler could not file until the land was surveyed and until the Land Office was opened. The settlement and occupancy alone would be notice to the railroad company, it being impossible to make a filing.

The fact that a patent was not issued to Andrew Madsen until 1896 does not effect the case because Moroni Olney's settlement and filing under the pre-emption laws excepted the land from the grant. The acts of Congress material to this case are:

The general pre-emption law showing the right of the entryman, Rev. Stat. U. S., Sec. 2266, which law was

extended over Utah by the act of July 16, 1868, establishing also a land office at Salt Lake City (15 Stat. at large, 91). (2) The act of July 1, 1862 (12 Stat. at large, 489), making the grant to the Pacific railways, which act contains the reservation from the grant, of land to which pre-emption or homestead claim may have been attached (Section 3 of that act). (3) The act of July 2, 1864, (13 Stat., 356). Section 4 of this act amended the former act. The congressional record shows that numerous petitions were sent to Congress praying for protection to settlers and the following proviso was put into the act in consequence thereof: "And any lands granted by this act or the act to which this is an amendment, shall not defeat or impair any pre-emption, homestead, swamp land or other lawful claim, nor include any Government reservation or mineral lands, or the improvements of any bona fide settler. (4) The joint resolution of April 10, 1869 (16 Stat. at large, 59), and the act of May 6, 1870. (5) The act of 1876 (19 Stat. at large, 35), confirming all pre-emption and homestead claims prior to notice of withdrawal at local land offices.

The claim of the plaintiff in error is in effect that the land passed to the company for the reason that on October 20, 1868, the alleged date of definite location, there was no filing of public record. No declaratory statement could be filed prior to October 20, 1868, for the reason that the land was not surveyed and a plat filed in the United States Land Offices until 1869. (T. of R., page 7,

item 7). No declaratory statement could be filed prior to October 20, 1868, for the reason that the land office was not opened in Utah until 1869. (T. of R., page 8). Again, no declaratory statement was required on land of this character. "The act of March 27, 1854, for the relief of settlers on lands reserved for railroad purposes, and the rules and regulations prescribed by the Secretary of the Interior, in pursuance with that act, dispense with the declaratory statement."

> Collins vs. Bartlett, 44 Cal., 382.
>
> Lester's Land Laws, 213, No. 234; instructions thereon, Lester, 376, No. 413; see also decision of J. S. Wilson, Commissioner of General Land Office, in case of Watson vs. The Western P. R. R. Co., dated March 29, 1869, Land Laws by Zabriskie, 101.

We return now to the fact as to whether the land passed to the railroad company at the date of the definite location of its road. We have already called attention to the joint resolution of May, 1869, before which it could not be told whether the Union Pacific or Central Pacific could claim these lands. Next we have shown the law giving to the pre-emption claimant the right to purchase land that he had settled upon, and that he had three months after the filing of the plat in which to make his entry. This right could not be destroyed by the failure

to open the land office, because prior to that time the land office had been provided for by act of July, 1868.

In 1850 the Territorial government of Utah was organized. Congress passed the organic act and thereby extended an invitation to the citizens of the Government to establish their homes in the territory. Under this invitation citizens took up their abode here in great numbers. It was, of course, indisputably necessary that these settlers should found cities and villages at once and enter into possession of portions of the public domain. By the act of July 16, 1868, the pre-emption, homestead and other laws of the United States applicable to the disposal of the public lands were extended over Utah Territory and a land office established. The executive officers of the United States failed to open the land office in Utah until 1869. The survey was not approved and a plat thereof filed in the United States Land Office until 1869. The population of Utah Territory in 1869 was 150,000. (Zab. Land Laws, 605). The citizens who had settled upon lands within the 40-mile limit of the grant to the Union and to the Central Pacific railroads could not make their filings until the land office opened and until the plats of survey had been filed and approved. The pre-emption law provided (Section 2236 R. S.) that the pre-emption claimant must file the declaratory statement within three months from the date of the filing of the plat of survey. It is also a well established rule "that when an individual in the prosecu-

tion of a right, does everything which the law requires him to do, and he fails to attain his right by the misconduct or neglect of a public officer, the law will protect him."

Lytle vs. State of Arkansas, 9 How., 314.
The Yosemite Valley case, 15 Wall., 77.
Beaty vs. Sale, 43 Ill., 351.
Kite vs. Tibbs, 23 Cal., 432.

The fact then that the survey was not approved or filed, and the fact that the land office was not opened until 1869, did not destroy any pre-emption claim; it merely extended the time to make the filing until the land office was opened.

The Department of the Interior has uniformly held that a settlement made by a qualified pre-emptor prior to the definite location of the road, and the filing of a declaratory statement in pursuance of such settlement, excepted the land from the grant. The decisions of the Department of the Interior have been acquiesced in for a period of about thirty years. The railroad companies have never taken a case to the higher courts from Utah involving the exception of a pre-emption claim. Although about thirty years have gone by the question has never been raised before that the mere fact that the executive officers neglected to open a land office would enlarge the grant to the company—thus including all the land settled upon

and all the towns occupied within the 40-mile grant limit between Wyoming and Nevada. The question was however agitated before the department and before Congress and to forever settle it, on the 21st day of April, 1876 (19 Stat at large, 35), Congress passed an act entitled an act to confirm pre-emption and homestead entries of public lands within the limits of railroad grants where such entries have been made under the regulations of the Land Department.

In the case of Taberck vs. B. M. R. R. Co. (13 Fed. Rep., 105), the Court says: "That act (referring to the above act) like previous laws of a similar kind, was intended to give force and effect to the principle that when an individual in the prosecution of a right does everything which the law requires him to do, and he fails to attain his right by the misconduct or neglect of a public officer, the law will protect him. (Lytle vs. State of Arkansas, 9 How. 533). But this principle applies only when by law or contract the acquisition of a right is made dependent upon the performance of certain specified acts."

An attempt was made in Congress to amend this confirmatory act of 1876 by inserting a provision that vested rights should not be interfered with. The amendment was not made. Congress had the power to alter, amend or repeal the Pacific Railroad act.

Menotti vs. Dillon, 167 U. S., 712.

Again, even if it be conceded that this patent could

be collaterally attacked, the appellant here did not negative in his proof the terms of the proviso of the act of July 2, 1864 (13 Stat., 356). The grant did not defeat or impair (1) any pre-emption or homestead claim. (Claim is the word used, not "right.") (2) any swamp land, (3) any other lawful claim, (4) any Government reservation, (5) any mineral land, (6) the improvements of any bona fide settler. This he was compelled to show.

Corinne Mill Co. vs. Johnson, 7 Utah, 327.

Same case affirmed, 156 U. S., 574.

He did not show even that this land was at the date public land; he did not show that it was not reserved; he did not show there was any other lawful claim upon the land; he did show it was not included in any military or Indian reservation, but not any other Government reservation; nor did he show the land was not covered by the improvements of any bona fide settler. This last provision of the proviso refers to the land of any settler in good faith who intends to acquire the Government title.

McLaughlin vs. Menotti, 89 Cal., 355.

It is true that in a later case it was held that the word "or" as printed in the statute should be "on."

McLaughlin vs. Menotti, 105 Cal., 572.

But the Supreme Court of the United States expressly declined to pass upon this point.

Menotti vs. Dillon, 167 U. S., 703.

A simple inspection of the act shows that the printed copy of the laws using the word "or" must be the correct one.

Therefore the plaintiff should have been nonsuited for failure to show that this land did not fall within some of the exceptions.

III.

But we contend that conceding everything the appellant claims as to the date of the definite location of the road, to-wit, October 20, 1868, and the fact that no pre-emption claim was filed until May, 1869, the law is not so harsh as it is contended to be, namely—that unless at the date of definite location the claim had been actually filed in the land office, the grant took effect to the railroad despite the fact that the settler was bona fide, despite the fact that there was no land office, despite the fact that the plat was not filed.

The language of the proviso of July 2, 1864, excepts from the railroad grant any pre-emption or homestead or any other lawful claim.

If the construction asked for by the appellant be correct, all land occupied by citizens and all the towns on Government lands along the Pacific railways, although existing at the date of the definite location, belong to the railroad company, if on the alternate sections. Such a claim has never been made before. The history of the settlement of Utah shows that many towns are located on these alternate sections, but the railroad company has

not yet attempted to claim them. A ruling such as asked for here would be far-reaching in its consequences and of incalculable injury.

It would appear then that the ruling of the Land Office upon this point, which shows that at the date of definite location these lands were settled and occupied, is correct. Congress has given the settlement of these claims to the Land Department. It must pass upon all questions as to the nature of the land and whether it is open to sale, and its judgment upon these matters is that of a special tribunal, and is unassailable, except by direct proceedings for its annulment or limitation.

> Steel vs. Smelting Co., 106 U. S., 447, 450, approved.
>
> Northern Pacific vs. Colburn, 164 U. S., 383.
>
> Barden vs. Northern Pacific Railroad, 154 U. S., 288, at p. 328.

The Department in 1869 allowed a declaratory statement to be filed on this land, thereby deciding it was not railroad land. That ruling is not subject to review here, nor is it complained of. It was never appealed from, so far as the record shows. Nothing is shown as to the grounds on which the Land Department acted at the time.

> Durango Land Co. vs. Evans, 25 C. C. A., 523.
>
> Moore vs. Northern Pacific, 45 Pac. Rep., 216.

Thirty years have passed by, many patents have been

issued in Utah, and many townsites have been granted, all despite the fact they were on railroad sections. It is too late for the railroad company or its grantee now to claim that these settled lands were within their grant.

If now we leave out of view the decisions and consider merely the language as it stands, we must reach the same conclusion. Conceding that pre-emption or homestead claim means a filed claim, the words any other lawful claim must mean something else than such claims as are filed. A lawful claim is not one contrary to law. It may well be that the Government is not compelled to recognize the right of a mere settler without entry. Yet such a claim is lawful and Congress has always, as its settled policy shows, tried to protect such claims. In that sense they are lawful and meritorious.

U. S. vs. Tithing Yard, 9 Utah, 280.

As far back as 1860 the Territorial Legislature had recognized and provided for these possessory rights and protected them.

Comp. Laws of 1876, Sec. 612, p. 252.

There was a complete pre-emption in this case, absolutely following the pre-emption law in every particular. The date of settlement made in the declaratory statement is not necessarily the real date; but the fact of filing being allowed, shows that the land office received the entry as prior to the date of definite location, and

the finding of the Register and Receiver, showing that Moroni Olney's settlement was prior to October 20, 1868, shows conclusively that the date of settlement was prior to the date stated in the declaratory statement.

If, then, these lands were within the proviso, they did not pass. And the fact that Moroni Olney's claim lapsed or failed did not cause the lands to revert to the railroad company.

Barden vs. Northern Pacific, 145 U. S., 535.
Hastings vs. Whitney, 132 U. S., 357
Kansas Pacific Company vs. Dunmeyer, 113 U. S., 629.
Northern Pacific vs. Colburn, 164 U. S., 383.

Therefore it appears that this patent was issued after a litigation in the Land Department over the very fact as to whether these lands were open to entry, and the patent issued on that decision cannot be collaterially attacked.

It is respectfully submitted that the decision of the Supreme Court of Utah should be affirmed.

B. H. JONES,
Attorney for Defendant in Error.

FILED
JAN 25 1900
JAMES H. McKENNEY,
Clerk.

No. 119.

Reply Brf. of Jones for D. C.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

Filed Jan. 25, 1900.

No. 1193

D. P. TARPEY, PLAINTIFF IN ERROR,

vs.

ANDREW MADSEN.

IN ERROR TO THE SUPREME COURT OF THE STATE OF UTAH.

REPLY BRIEF OF DEFENDANT IN ERROR.

B. H. JONES,
Attorney for Defendant in Error.

(16,961.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 119.

D. P. TARPEY, PLAINTIFF IN ERROR,

vs.

ANDREW MADSEN.

IN ERROR TO THE SUPREME COURT OF THE STATE OF UTAH.

(16,961.)

The defendant in error claims that the land in dispute was excepted and reserved from the grant:

1st. Under Section 3 of the act of July 1, 1862 (12 Stat., 489), by virtue of the settlement of Olney, made prior to the date of definite location, accompanied by a filing as soon as the land office opened.

2d. Under Section 4 of the act of July 2, 1864 (13 Stat., 356), which provided that the grant shall not "defeat or impair any pre-emption claim."

3d. Under Section 4 of the act of July 2, 1864 (13 Stat., 356), which provided that the grant shall not include "the improvements of any bona fide settler."

The Colburn case, 164 U. S. 383, is not in point. In that case it was claimed that the land was excepted from the grant because of the occupation of one Horace F. Kelly on the date of definite location, unaccompanied by a filing, "then or thereafter." The land was surveyed and the survey filed, and the land office was open.

In this case there was occupation and cultivation of Olney *accompanied by a pre-emption filing* as soon as the plot or survey was filed and the land office was opened.

The case of Salt Company *vs.* Tarpey, 142 U. S., 241, is not in point. This case did not decide anything whatever respecting the exceptions in the land grant, "but only that the title to the lands granted took effect, with certain designated exceptions, as of the date of the grant." It never decided anything else.

See Barden *vs.* Northern Pacific R. R. Co., 154 U. S., 315.

The decision of the Utah Supreme Court in this case, Tarpey *vs.* Madsen, 53 Pac., 996, is the only one involving the exceptions and reservations where no survey was approved or filed and where no land office was opened.

Prior to the passage of the act of 1862 nearly all of the valuable lands in Utah and Nevada were occupied.

It was considered that these settlers were protected by Section 3 of the Act of 1862. This provision only granted "public lands not sold, reserved or otherwise disposed of and to which a pre-emption claim may not have attached."

Resolution of Cradlebaugh, of Nevada, 58 Congressional Globe, 1700.

Speech of Cradlebaugh, of Nevada, 59 Congressional Globe, 1949.

Speech of Harlan, 59 Congressional Globe, 2217.

Afterwards, in 1864, to make assurance doubly sure Congress inserted the following new exception and reservation in Section 4:

"Any lands granted by this act, or the act to which this is an amendment, shall not defeat or impair any pre-emption, homestead, swamp-land or other lawful claim."

Speaking of this section this court said: "This new provision may make other exceptions while enlarging the grant, and was undoubtedly intended *to add further safeguards to the settler* and further protection to the public."

K. P. R. R. Co., *vs.* Dunmeyer, 113 U. S., 636.

Speaking of this identical section this court said: "Hence we have in the clause of reservation a much more liberal and extended protection of pre-existing rights than in the reservation clause which had become a formula in previous grants.

"Not only are prior reservations made by the government, and rights of pre-emption excepted, but the improvements of bona fide settlers, * * * and any other lawful claim, are unaffected by the grant. Of course this means *any honest claim evidenced by improvements or other acts of possession.*"

Broder *vs.* Water Co., 101 U. S., 277.

In most of the Western States there were no "entered" or "attached" claims. There were no land offices—no surveys.

In this amendatory act of 1864 the word "attached" is eliminated. The idea that it should be an entered claim is abandoned. Had Congress intended to extend its protection only to those whose claims had been entered or "attached" by a filing in the land office this new exception would never have been made. The very purpose of these Pacific Railroad grants was to open up with a view to the rapid settlement of the country vast portions of the public domain unsurveyed and practically unexplored. It was known that a long time would

elapse before land offices would be opened and the public surveys established. "Claim" is the possession of a settler upon wild lands belonging to the government, also the lands themselves so possessed. (3 A. & E. Enc. of L. 273–276, Note 1.)

Bouvier's Law Dictionary, under Claim.

Actual settlement, inhabitation and improvement are essential to a pre-emption right to the ultimate title.

Hosmer *vs.* Wallace, 97 U. S., 575.

Under the pre-emption law, settlement is the first essential; the claimant must afterwards give his notice of intention, inhabit, improve, build his house and make his proof and payment, but in every stage he is protected.

To the railroad company the age status or degree of advancement of the claim is immaterial.

In following the role of guardian and protector of United States lands, the Central Pacific Company in the hundreds and hundreds of contests before the Department of the Interior objects to every degree of advancement of a claim.

In Halling *vs.* Central Pacific before the Interior Department the Company used the lollowing language: "The purpose and intent of Congress in the enactment of the pre-emption and homestead laws, *i. e.*, the making of homes upon the public lands, was totally disregarded."

The defendant in error is attempting to insert or import by construction the word "attached" into this amendatory act of 1864.

In Utah numerous patents have been issued every year from 1869 to the present time, to settlers and cities and towns on odd sections within the forty-mile railroad limits. The decisions of the Department has been followed so long that it has become a rule of property.

If this land was not excepted, then there was no land whatever reserved from the grant, because there was no land office where a filing could be made on October 20, 1868.

All proofs to the Register of the local land office show settlement prior to the date of definite location.

"The patent upon a pre-emption settlement takes effect from the time of the *settlement* as disclosed in the declaratory statement or *proofs* of the settler to the Register of the local land office."

Shepley *vs.* Cowan, 1 Otto, 337.

In view of the fact that the Government declined to issue a patent to the railroad company in 1869, but on the contrary permitted Olney's filing, this case should be treated as though patent had been issued to the settler at that date, and it would take effect from the time of settlement prior to October 20, 1868.

The reasons given by Mr. Julian for the passage of the act

of 1868, opening a land office in Utah, will be found in 80 Congressional Globe, page 2813, Report of Commissioner.

The Register and Receiver held in this case that the land in dispute was reserved and excepted from the grant, because:

"1st. A pre-emption claim had attached to the land in dispute at the time the line of said road was definitely fixed.

"2d. That there was a qualified pre-emption claimant upon the land at that time, which brought it within the first portion of the excepting clause of the act of 1864, which provides that any land granted by this act, or the act to which it is an amendment, shall not defeat or impair any pre-emption claim.

"3d. On the 20th day of October, 1868, the land in dispute contained the improvements of a bona fide settler, which also excepted the land from the provisions of the grant."

I have obtained from the Commissioner of the General Land Office a certified copy of this decision in full, which I ave left with Clerk McKenny for the use of this Court.

The plaintiff in error is responsible for all deficiencies in the bill of exceptions, and it will be most strongly construed against him. This case was tried before the Court and a jury. (Trans., 6.)

As guardian and protector of United States lands, plaintiff in error says that Olney's pre-emption claim was defective.

Under the rules of the Department of the Interior before Olney was permitted to part with his money and make his filing in 1869, a contest was disposed of and the land officers judicially determined that this land was open to Olney's filing.

The defendant in error has not produced this decision. The presumptions are in favor of the action of the Department of the Interior.

Again, the oath required under Section 13 of the pre-emption act of 1841, 5 Stat., 456, is not here. It is presumed that the land officers did their duty. The presumptions are that it corrected everything.

The bill of exceptions is fatally defective.

These ultimate facts fail entirely to show that the land was not within certain exceptions and reservations as shown on page 8 of our first brief.

Corinne Mill, Canal and Stock Co. *vs.* Johnson, 156 U. S., 575.

However, we request the Court to pass upon the important question in the case for the reason that there are numerous cases before the Department of the Interior, and in the State and Federal Courts, with the same question involved awaiting determination.

It is respectfully submitted that the decision of the Supreme Court of Utah should be affirmed.

B. H. JONES,

TARPEY *v.* MADSEN.

ERROR TO THE SUPREME COURT OF THE STATE OF UTAH.

No. 119. Argued January 25, 26, 1900.—Decided May 21, 1900.

The right of one who has actually occupied public land, with an intent to make a homestead or preëmption entry, cannot be defeated by the mere lack of a place in which to make a record of his intent.

The law deals tenderly with one who, in good faith, goes upon public lands, with a view of making a home thereon.

When the original entryman abandons the tract entered by him, and it comes within the limits of a grant to a railroad company, a third party,

coming in after the lapse of many years, and setting up the title of that entryman, does not come in the attitude of an equitable appellant.

A proper interpretation of the acts of Congress making railroad grants like the one in this case requires that the relative rights of the company and an individual entryman must be determined, not by the act of the company, in itself fixing definitely the line of its road, or by the mere occupancy of the individual, but by record evidence, on the one part the filing of the map in the office of the Secretary of the Interior, and, on the other, the declaration or entry in the local land office; and while, as repeatedly held, the railroad company may not question the validity or propriety of the entryman's claim of record, its rights ought not to be defeated long years after its title had apparently fixed, by fugitive and uncertain testimony of occupation.

This case comes on error to the Supreme Court of the State of Utah, and involves the title to the S.W. $\frac{1}{4}$ of section 29, township 11 north, of range 2 west. This tract is within the place limits of the grant to the Central Pacific Railroad of California. The map of definite location of that part of the road opposite this land was filed, and approved by the Secretary of the Interior, on October 20, 1868, and the entire road was constructed and accepted prior to 1870. The land is not mineral nor swamp land, nor was it returned or denominated as such; was agricultural in character; and at the date of the filing of the map of definite location there was nowhere any record evidence of a private claim. At that time no local land office had been established in the district in which this land is situated. Such office was opened some time in April or May, 1869. On May 29, 1869, this declaratory statement was filed:

"*Declaratory statement for cases where the lands are not subject to private entry.*

"I, Moroni Olney, of Box Elder County, Utah Territory, being a citizen of the United States and the head of a family, have on the 23d day of April, 1869, settled and improved the S.W. $\frac{1}{4}$ of section 29, township 11 north, of range 2 west, in the district of lands subject to sale, at the land office in Salt Lake City, Utah, and containing 160 acres, which land has not yet been offered at public sale, and thus rendered subject to private entry, and I do hereby declare my intention to claim said

tract of land as a preëmption right under the provisions of said act of 4th September, 1841.

"Given under my hand this 29th day of May, 1869.

(Signed) "MORONI OLNEY.

"In the presence of—

"ABRAHAM HUNSAKER."

Nothing further was done by Olney. He abandoned the land, and nothing appears to have been heard of him since the date of the entry. On June 20, 1896, Andrew Madsen, the defendant in error, who alleged that he had been a settler and in occupation of the tract since 1888, filed a homestead entry thereof in the local office. A contest had previously and in 1893 been instituted between the railroad company and Madsen, which was heard and decided by the register and receiver, whose decision was affirmed by the Commissioner of the General Land Office, the finding of the register and receiver, as appears from the record in this case, being—

"We find that the tract in question, which is the S.W. $\frac{1}{4}$ of section 29, township 11 north, of range 2 west, of the Salt Lake meridian, was settled upon and occupied and claimed by a qualified entryman, to wit, Moroni Olney, prior to October 20, 1868, which therefore excepted the land from the operation of the grant of Congress to the Central Pacific Railroad Company."

A certified copy of that decision in full was filed by counsel for defendant in error on the hearing in this court, and that certified copy reads as follows:

"This case arises upon an application to enter a tract of land covered by a railway selection, which it is sought to cancel, for the reason that a valid settlement had been made on the land prior to the date of the attachment of the grant to the railway company.

"Our decision is that the motion of the Central Pacific Railway Company to strike out, dismiss and expunge the depositions from the records should be denied. We therefore find the issues in favor of Andrew Madsen, and that the tract of land in dispute was reserved and excepted from the grant to the railroad company, because, first, a preëmption claim had attached

to the land in dispute at the time the line of said road was definitely fixed.

"2d. There was a qualified preëmption claimant upon the land at that time, which brought it within the first portion of the excepting clause of the act of 1864, which provides that any lands granted by that act, or the act to which it is an amendment, shall not defeat or impair any preëmption claim.

"3d. On the 20th day of October, 1868, the land in dispute contained the improvements of a *bona fide* settler, which also excepted the land from the provisions of the grant.

"We further find that Central Pacific Railway selection No. 3 should be cancelled as to the tract in dispute, and that Andrew Madsen should be permitted, if he so desires, to make preëmption entry covering this land.

"We decide that he should be permitted to enter the land under the preëmption law, because his right to do so—*i. e.*, his settlement upon the land—was initiated long prior to the act of March 3, 1891, repealing the preëmption law, which repealing act expressly excepted all *bona fide* claims lawfully initiated before the passage of the act."

After the decision of the Commissioner affirming that of the register and receiver, the entry was made and a patent was issued to Madsen.

Prior thereto and on January 12, 1894, this action was brought in the fourth judicial district of the Territory of Utah, county of Box Elder, by the plaintiff in error, grantee from the railroad company, to establish his title to the tract and to recover possession. In the trial court, after the issue of the patent and the admission of Utah as a State, a decree was entered in favor of the defendant. The case was taken by appeal to the Supreme Court of the State, and by that court the decree of the district court was affirmed, 17 Utah, 352, to review which decree this writ of error was brought.

Mr. L. E. Payson for plaintiff in error. *Mr. L. R. Rogers* filed a brief for same.

Mr. B. Howell Jones for defendant in error.

Opinion of the Court.

MR. JUSTICE BREWER, after stating the case, delivered the opinion of the court.

A narrow but important question is presented by this record. The land in controversy is an odd numbered section within the place limits of the grant to the Central Pacific Railroad Company. The identification of the lands which passed by that grant was made at the time the map of definite location was filed in the office of the Secretary of the Interior, and by him approved, to wit, October 20, 1868, and the question is whether there was anything in the occupation or entry by Olney to defeat the title apparently then passing to the railroad company. That there was nothing of record affecting the validity of that title is conceded. No one, by an investigation of any public record, could have ascertained at that time that there was any doubt in respect thereto.

It is true that there was then no local land office in which those seeking to make preëmption or homestead entries could file their declaratory statements or make entries, and the want of such an office is made by the Supreme Court of the State one of the main grounds for holding that the land did not pass to the railroad company. We agree with that court fully in its discussion of the general principles involved in the failure of the Government to provide a local land office. The right of one who has actually occupied, with an intent to make a homestead or preëmption entry, cannot be defeated by the mere lack of a place in which to make a record of his intent. In many States the statutory provision in respect to suits is that the defendant, on receiving service of summons, must within a certain time file his answer in the office of the clerk of the court. It cannot be doubted that if, before he is thus called upon to file his answer the office is burned, and the clerk dies, and there is no place or individual at which or with whom his answer can be filed, such accident or omission will not defeat his right to make a defence, or give to the plaintiff a right to take judgment by default. Where the accident or omission is not the fault of the party but of the Government, or some official of the government, such accident or omission cannot defeat

the right of the individual, and in all that is said in respect to this by the Supreme Court of the State of Utah we fully agree. If Olney was in possession of this tract before October 20, 1868, with a view of entering it as a homestead or preëmption claim, and was simply deprived of his ability to make his entry or declaratory statement by the lack of a local land office, he could undoubtedly, when such office was established, have made his entry or declaratory statement in such way as to protect his rights. But when the office was opened he filed his declaratory statement, and in that he did not suggest that he had been in the occupation of the premises prior to October 20, 1868, but declared that on the 23d of April, 1869, he settled and improved the tract. Assume that such declaration was subject to correction by him, that he could thereafter have corrected the mistake (if it was a mistake) and shown that he occupied the premises prior to October 20, 1868, with an intent to enter them as a homestead or preëmption claim, he never did make the correction, and there is nothing in the record to show that his occupation prior to April 23, 1869, was with any intent to acquire title from the United States.

And in this respect we must notice the oft-repeated declaration of this court, that "the law deals tenderly with one who, in good faith, goes upon the public lands with a view of making a home thereon." *Ard* v. *Brandon*, 156 U. S. 537, 543; *Northern Pacific Railroad* v. *Amacker*, 175 U. S. 564, 567. With this declaration, in all its fulness, we heartily concur, and have no desire to limit it in any respect, and if Olney, the original entryman, was pressing his claims every intendment should be in his favor in order to perfect the title which he was seeking to acquire. But when the original entryman, either because he does not care to perfect his claim to the land or because he is conscious that it is invalid, abandons it, and a score of years thereafter some third party comes in and attempts to dispossess the railroad company (grantee of Congress) of its title—apparently perfect and unquestioned during these many years—he does not come in the attitude of an equitable appellant to the consideration of the court.

It must be remembered that mere occupation of the public

lands gives no right as against the government. It is a matter of common knowledge that many go on to the public domain, build cabins and establish themselves, temporarily at least, as occupants, but having in view simply prospecting for minerals, hunting, trapping, etc., and with no thought of acquiring title to land. Such occupation is often accompanied by buildings and enclosures for housing and care of stock, and sometimes by cultivation of the soil with a view of providing fresh vegetables. These occupants are not in the eye of the law considered as technically trespassers. No individual can interfere with their occupation, or compel them to leave. Their possessory rights are recognized as of value and made the subjects of barter and sale. *Lamb* v. *Davenport*, 18 Wall. 307. In that case it appeared that certain individuals settled on what is now the city of Portland, Oregon, and laying off a townsite distributed among themselves the lots. Thereafter they bought and sold those lots as things of value, and although such settlement was antecedent to any act of Congress authorizing it, their contracts in respect to the lots were sustained, the court, speaking by Mr. Justice Miller, saying (p. 314):

"And though these rights or claims rested on no statute, or any positive promise, the general recognition of them in the end by the Government, and its disposition to protect the meritorious actual settlers, who were the pioneers of emigration in the new territories, gave a decided and well understood value to these claims. They were the subjects of bargain and sale, and, as among the parties to such contracts, they were valid."

But notwithstanding this recognition of the rights of individual occupants as against all other individuals, it has been uniformly held that no rights are thus acquired as against the United States. In *Camfield* v. *United States*, 167 U. S. 518, this court sustained a bill filed by the United States to compel by mandatory injunction certain parties to vacate public lands which they were occupying without any intent to purchase, and whose occupancy therefore stood in the way of others who might wish to enter and acquire title under the land laws of the United States. See also *Frisbie* v. *Whitney*, 9 Wall. 187; *The Yosemite Valley Case*, 15 Wall. 77.

It is undoubtedly true that one occupying land with a view of preëmption is given thirty days within which to file with the register of the land office his declaratory statement, Rev. Stat. § 2264 and since 1880 the same right has been possessed by one desiring to make a homestead entry. Act of May 14, 1880, 21 Stat. c. 89, sec. 3. So that any controversy between two occupants of a tract open to preëmption and homestead entry is not determined by the mere time of the filing of the respective claims in the land office, but by the fact of prior occupancy, and these controversies are of frequent cognizance. Oral evidence, therefore, of the date of occupancy may be decisive of the controversy between such individual applicants for a tract of public land, but by decisions of this court, running back to 1882, as between a railroad company holding a land grant and an individual entryman the question of right has been declared to rest not on the mere matter of occupancy, but upon the state of the record. All the cases in this court, in which this question has been discussed and the conclusion announced, have been since the act of 1880, giving to persons seeking a homestead the same rights in respect to occupancy as to persons intending a preëmption.

The original Union Pacific Railroad act (12 Stat. 492, sec. 3) excepted from the grant of the odd sections to the railroad company all those tracts to which an adverse right had attached "at the time the line of said road is definitely fixed." The act does not in terms prescribe how or by what evidence it shall be determined that the line of said road has become definitely fixed, and for many years after its passage, interpreting this and other like railroad land grants, the ruling of the land department was that the line was definitely fixed whenever it was surveyed, staked out and marked on the face of the earth, *United States* v. *Winona &c. Railroad*, 165 U. S. 463, 473, and that if at that time there was no adverse right the title of the railroad company was settled. Of course, this left such date one to be determined by oral testimony, and so as to each individual odd-numbered tract within the place limits of the grant the question of title was determined by evidence of the time of surveying, staking and marking on the face of the earth the line of

the railroad, and corresponding evidence of occupancy by an individual with a view to entry under the general land laws. No title, therefore, certainly passed to the railroad company until a patent had been issued to it; and, indeed, under the settled ruling that land which was held by a prior claim did not pass to the railroad company under its grant, it was doubtful whether even then it had received a title beyond challenge. This unfortunate uncertainty and instability of title continued until the decisions of this court in *Van Wyck* v. *Knevals*, 106 U. S. 360, and *Kansas Pacific Railway Company* v. *Dunmeyer*, 113 U. S. 629, the first decided in October, 1882, and the latter in March, 1885. By those cases it was settled that the time at which the title of the railroad company passed beyond question was that of the filing of an approved map of definite location in the office of the Secretary of the Interior. This eliminated all oral testimony, and established a date at which, by record, the title of the railroad company could be considered as definitely ascertained. In the latter of the two cases, *Kansas Pacific Railway Company* v. *Dunmeyer*, the same elimination of oral testimony, the same reference to the record as determining all opposing rights of the individual entryman, was also declared. That was a case of a homestead entry, but as five years prior thereto homestead and preëmption entries had been placed in the same category as far as respects the right of preliminary occupation, it is not strange that the court in that opinion spoke generally of preëmption and homestead entries.

After referring to the rule in reference to the filing of the map of definite location in the office of the Secretary of the Interior, Mr. Justice Miller, announcing the conclusions of the court, said (p. 640):

"This filing of the map of definite location furnished also the means of determining what lands had previously to that moment been sold, reserved or otherwise disposed of by the United States, and to which a preëmption or homestead claim had attached; for, by examining the plats of this land in the office of the register and receiver, or in the General Land Office, it could readily have been seen if any of the odd sections within ten miles of the line had been sold, or disposed of, or reserved,

or a homestead or preëmption claim had attached to any of them."

And again (p. 641):

"It is not conceivable that Congress intended to place these parties as contestants for the land, with the right in each to require proof from the other of complete performance of its obligation. . . . The reasonable purpose of the government undoubtedly is that which it expressed, namely, while we are giving liberally to the railroad company, we do not give any lands we have already sold, or to which, according to our laws, we have permitted a preëmption or homestead right to attach. No right to such land passes by this grant."

And finally (p. 644):

"Of all the words in the English language, this word *attached* was probably the best that could have been used. It did not mean mere settlement, residence or cultivation of the land, but it meant a proceeding in the proper land office, by which the inchoate right to the land was initiated. It meant that by such a proceeding a right of homestead had fastened to that land, which could ripen into a perfect title by future residence and cultivation. With the performance of these conditions the company had nothing to do. The right of the homestead having attached to the land it was excepted out of the grant as much as if in a deed it had been excluded from the conveyance by metes and bounds."

The doctrine thus announced, that rights on either side as between the railroad company and the entrymen are determined by the facts appearing of record, has been repeatedly recognized since. In *Hastings & Dakota Railroad* v. *Whitney*, 132 U. S. 357, these rights were discussed by Mr. Justice Lamar, who, by reason of his experience as Secretary of the Interior, was preeminently qualified to speak in reference thereto. And an entry which was clearly open to challenge by the government was held to be effective to withdraw the land from the operation of the railroad grant. On page 361 Mr. Justice Lamar observed:

"In the light of these decisions the almost uniform practice of the department has been to regard land, upon which an entry of record valid upon its face has been made, as appropriated

and withdrawn from subsequent homestead entry, preëmption settlement, sale or grant until the original entry be cancelled or declared forfeited; in which case the land reverts to the government as part of the public domain, and becomes again subject to entry under the land laws."

And then, after referring to the contention that the *Dunmeyer* case was not conclusive because in that case the entry was valid on its face, while this was defective, he added (p. 364):

"But these defects, whether they be of form or substance, by no means render the entry absolutely a nullity. So long as it remains a subsisting entry of record, whose legality has been passed upon by the land authorities, and their action remains unreversed, it is such an appropriation of the tract as segregates it from the public domain, and therefore precludes it from subsequent grants. In the case before us, at the time of the location of the company's road, an examination of the tract books and the plat filed in the office of the register and receiver, or in the land office, would have disclosed Turner's entry as an entry of record, accepted by the proper officers in the proper office, together with the application and necessary money, an entry the imperfections and defects of which could have been cured by a supplemental affidavit or by other proof of the requisite qualifications of the applicant. Such an entry attached to the land a right which the road cannot dispute for any supposed failure of the entryman to comply with all the provisions of the law under which he made his claim. A practice of allowing such contests would be fraught with the gravest dangers to actual settlers, and would be subversive of the principles upon which the munificent railroad grants are based."

Still later, in *Whitney* v. *Taylor*, 158 U. S. 85, in which the validity of a preëmption entry was challenged as against a railroad grant, we said (p. 94):

"But it is also true that settlement alone, without a declaratory statement, creates no preëmption right. 'Such a notice of claim or declaratory statement is indispensably necessary to give the claimant any standing as a preëmptor, the rule being that his settlement alone is not sufficient for that purpose.' *Lansdale* v. *Daniels*, 100 U. S. 113, 116. And the acceptance

or a homestead or preëmption claim had attached to any of them."

And again (p. 641):

"It is not conceivable that Congress intended to place these parties as contestants for the land, with the right in each to require proof from the other of complete performance of its obligation. . . . The reasonable purpose of the government undoubtedly is that which it expressed, namely, while we are giving liberally to the railroad company, we do not give any lands we have already sold, or to which, according to our laws, we have permitted a preëmption or homestead right to attach. No right to such land passes by this grant."

And finally (p. 644):

"Of all the words in the English language, this word *attached* was probably the best that could have been used. It did not mean mere settlement, residence or cultivation of the land, but it meant a proceeding in the proper land office, by which the inchoate right to the land was initiated. It meant that by such a proceeding a right of homestead had fastened to that land, which could ripen into a perfect title by future residence and cultivation. With the performance of these conditions the company had nothing to do. The right of the homestead having attached to the land it was excepted out of the grant as much as if in a deed it had been excluded from the conveyance by metes and bounds."

The doctrine thus announced, that rights on either side as between the railroad company and the entrymen are determined by the facts appearing of record, has been repeatedly recognized since. In *Hastings & Dakota Railroad* v. *Whitney*, 132 U. S. 357, these rights were discussed by Mr. Justice Lamar, who, by reason of his experience as Secretary of the Interior, was preeminently qualified to speak in reference thereto. And an entry which was clearly open to challenge by the government was held to be effective to withdraw the land from the operation of the railroad grant. On page 361 Mr. Justice Lamar observed:

"In the light of these decisions the almost uniform practice of the department has been to regard land, upon which an entry of record valid upon its face has been made, as appropriated

and withdrawn from subsequent homestead entry, preëmption settlement, sale or grant until the original entry be cancelled or declared forfeited; in which case the land reverts to the government as part of the public domain, and becomes again subject to entry under the land laws."

And then, after referring to the contention that the *Dunmeyer* case was not conclusive because in that case the entry was valid on its face, while this was defective, he added (p. 364):

"But these defects, whether they be of form or substance, by no means render the entry absolutely a nullity. So long as it remains a subsisting entry of record, whose legality has been passed upon by the land authorities, and their action remains unreversed, it is such an appropriation of the tract as segregates it from the public domain, and therefore precludes it from subsequent grants. In the case before us, at the time of the location of the company's road, an examination of the tract books and the plat filed in the office of the register and receiver, or in the land office, would have disclosed Turner's entry as an entry of record, accepted by the proper officers in the proper office, together with the application and necessary money, an entry the imperfections and defects of which could have been cured by a supplemental affidavit or by other proof of the requisite qualifications of the applicant. Such an entry attached to the land a right which the road cannot dispute for any supposed failure of the entryman to comply with all the provisions of the law under which he made his claim. A practice of allowing such contests would be fraught with the gravest dangers to actual settlers, and would be subversive of the principles upon which the munificent railroad grants are based."

Still later, in *Whitney* v. *Taylor*, 158 U. S. 85, in which the validity of a preëmption entry was challenged as against a railroad grant, we said (p. 94):

"But it is also true that settlement alone, without a declaratory statement, creates no preëmption right. 'Such a notice of claim or declaratory statement is indispensably necessary to give the claimant any standing as a preëmptor, the rule being that his settlement alone is not sufficient for that purpose.' *Lansdale* v. *Daniels*, 100 U. S. 113, 116. And the acceptance

of such declaratory statement, and noting the same on the books of the local land office, is the official recognition of the preemption claim. While the cases of *Kansas Pacific Railway Co.* v. *Dunmeyer*, and *Hastings & Dakota Railway Co.* v. *Whitney*, *supra*, involved simply homestead claims, yet, in the opinion in each, preëmption and homestead claims were mentioned and considered as standing in this respect upon the same footing."

And in *Northern Pacific Railroad Company* v. *Colburn*, 164 U. S. 383, we held distinctly that no mere occupation of a tract of public land in and of itself excepted that tract from the operation of a railroad grant; that a settler could not dispute the claim of a railroad company until and unless he had filed his entry in the proper land office. Still later, in *Northern Pacific Railroad* v. *Sanders*, 166 U. S. 620, 630, we said:

"Any other interpretation would defeat the evident purpose of Congress in excepting from railroad grants lands upon which claims existed of record at the time the road to be aided was definitely located. What that purpose was has been frequently adverted to by this court."

And subsequently, on page 631, we quoted, as the settled law in this respect, from *Kansas Pacific* v. *Dunmeyer* the first of the quotations therefrom heretofore given in this opinion.

If it be said that this rule ignores the privileges given to temporary occupants of land to make entry within a short time it must be said that it also denies the personal right of the railroad company to fix definitely its line of road. For when the company has by resolution of its directors established such line, and that has been marked on the ground by posts and stakes, it has done all required by the letter of the statute. If it be said that the railroad company may, notwithstanding its personal action thereafter, vote to locate its road on a different line, so on the other hand may it be said that the individual occupant of a tract may abandon his thought of entry; and by making each of the parties' rights, to wit, those of the railroad company and the individual, turn on a matter of record, the court simply gave definiteness and certainty to the congressional grant. It was said in *Missouri, Kansas & Texas Rail-*

way v. *Kansas Pacific Railway*, 97 U. S. 491, 497, repeated in *United States* v. *Southern Pacific Railroad*, 146 U. S. 570, 598: "It is always to be borne in mind, in construing a congressional grant, that the act by which it is made is a law as well as a conveyance, and that such effect must be given to it as will carry out the intent of Congress. That intent should not be defeated by applying to the grant the rules of the common law, which are properly applicable only to transfers between private parties." And surely Congress in making a grant to a railroad company intended that it should be of present force, and of force with reasonable certainty. It meant a substantial present donation of something which the railroad company could at once use, and use with knowledge of that which it had received. It cannot be supposed that Congress contemplated that, as in this case, a score of years after the line of definite location had been fixed and made a matter of record, some one should take possession of a tract apparently granted, and defeat the company's record title by oral testimony, that at the time of the filing of the map of definite location there was an actual though departed occupant of the tract, and therefore that the title to it never passed. The conditions are very different from those which exist between two individual occupants and claimants of a particular tract, for each is there in possession to watch and know the action of the other, and the question of right is subject to immediate and certain determination. In the present case, on the other hand, years after the title of the railroad company had apparently vested, this defendant comes in and says that this tract was excluded from the grant because somebody was in occupation, and if this can be said at the end of twenty years equally well can it be said at the end of half a century. So it is that interpreting the act making the grant as a law as well as a grant, and recognizing that Congress must have intended a present donation with reasonable certainty of identification, this court properly held that the records made in the office of the Secretary of the Interior and in the local land offices should be conclusive as between the company and the individual entryman. And if the ruling at times may oper-

ate against an individual entryman it does so more frequently against the railroad company in preventing it from claiming rights existing at the time that it in fact definitely locates its line of road.

It will be noticed that the third finding of the register and receiver states that on the 20th day of October the land in dispute contained "the improvements of a *bona fide* settler," which, as they held, also excepted the tract from the grant. This matter is also referred to in the opinion of the Supreme Court of Utah. But the exception in the amendatory act of 1864, 13 Stat. 358, of "the improvements of any *bona fide* settler," so far from sustaining the conclusion of the local officers, makes against it, for specifically exempting improvements contemplates cases in which the settler shall have a right to remove his improvements, although he may not have a right to perfect his title to the land. The exception is not of land on which are improvements of a *bona fide* settler but simply the improvements of a *bona fide* settler, thus distinguishing between a right to the land and a right to be protected in respect to the improvements.

Recapitulating, we are of opinion that a proper interpretation of the acts of Congress making railroad grants like the one in question requires that the relative rights of the company and an individual entryman, must be determined, not by the act of the company in itself fixing definitely the line of its road, or by the mere occupancy of the individual, but by record evidence, on the one part the filing of the map in the office of the Secretary of the Interior, and, on the other the declaration or entry in the local land office. In this way matters resting on oral testimony are eliminated, a certainty and definiteness is given to the rights of each, the grant becomes fixed and definite; and while, as repeatedly held, the railroad company may not question the validity or propriety of the entryman's claim of record, its rights ought not to be defeated long years after its title had apparently fixed, by fugitive and uncertain testimony of occupation; for if that be the rule, as admitted by counsel for defendant in error on the argument, the time will never come at which

it can be certain that the railroad company has acquired an indefeasible title to any tract.

For these reasons, we are of the opinion that the judgment of the Supreme Court of the State of Utah is erroneous, and it must be reversed and the case remanded to that court for further proceedings not inconsistent with this opinion.

THE CHIEF JUSTICE, MR. JUSTICE HARLAN and MR. JUSTICE WHITE dissented.